CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 28 AUGUST 17, 1994 NO. 33

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

19 CFR Part 4

(T.D. 94–62)

VESSELS IN FOREIGN AND DOMESTIC TRADES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to include Malta in the lists of nations which permit vessels of the United States to transport certain articles specified in section 27, Merchant Marine Act of 1920, as amended, between their ports. This amendment will provide reciprocal privileges for vessels of Maltese registry.

Customs has been furnished with satisfactory evidence that Malta places no restrictions on the transportation of certain specified articles by vessels of the U.S. between ports in that country.

EFFECTIVE DATES: The reciprocal privileges for vessels registered in Malta became effective on May 27, 1994. This amendment is effective August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Barbara Whiting, Carrier Rulings Branch, at 202–482–6940.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 27, Merchant Marine Act of 1920, as amended (46 U.S.C. App. 883), provides generally that no merchandise shall be transported by water, or by land and water, between points in the United States except in vessels built in and documented under the laws of the United States and owned by U.S. citizens. However, the sixth proviso of the Act, as amended, provides that upon a finding by the Secretary of the Treasury, pursuant to information obtained and furnished by the Secretary of State, that a foreign nation does not restrict the transportation of certain articles between its ports by vessels of the United States, reciprocal privileges will be accorded to vessels of that nation, and the prohibition

against transportation of those articles between points in the U.S. will not apply to its vessels.

In accordance with the Act, the Customs Service has listed in section 4.93(b)(1) of the Customs Regulations (19 CFR 4.93(b)(1)) those nations found to extend reciprocal privileges to vessels of the United States for the transportation of empty cargo vans, empty lift vans, and empty shipping tanks. Those nations found to grant reciprocal privileges to vessels of the United States for the transportation of equipment for use with cargo cans, lift vans, and shipping tanks; empty barges specifically designed for carriage aboard a vessel; empty instruments of international traffic; and certain stevedoring equipment and material, are listed in section 4.93(b)(2) of the Customs Regulations (19 CFR 4.93(b)(2)).

The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations Branch.

FINDING

By letter dated May 21, 1994, accompanied by a copy of a communication from the Embassy of Malta, the Department of State advised that Malta places no restrictions on the transportation of the articles listed in the Act by vessels of the United States between Maltese ports.

On the basis of information received from the Department of State and the Embassy of Malta, it has been determined that Malta places no restrictions on the transportation of the articles specified in section 27 of the Merchant Marine Act of 1920, as amended (46 U.S.C. App. 883), by vessels of the United States. Therefore, appropriate reciprocal privileges are accorded to vessels of Maltese registry as of May 27, 1994.

This document amends the regulations accordingly.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this amendment merely implements a statutory requirement and involves a matter in which the public is not particularly interested, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary. Furthermore, for the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1).

INAPPLICABILITY OF THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

This document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)*. That Act does not apply to any regulations such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.)* or any other statute.

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet Johnson, Regulations Branch, U.S. Customs Service. However, personnel from other offices of the Customs Service participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs duties and inspection, Exports, Freight, Harbors, Maritime carriers, Oil pollution, Reporting and recordkeeping requirements, Vessels.

AMENDMENT TO THE CUSTOMS REGULATIONS

To reflect the reciprocal privileges granted to vessels registered in Malta, Part 4, Customs Regulations (19 CFR Part 4), is amended as follows:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority for Part 4 and the specific authority for § 4.93 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91;

* * * * * * *

Section 4.93 also issued under 19 U.S.C. 1322(a), 46 U.S.C. App. 883;

* * * * * * *

2. Sections 4.93(b)(1) and (2) are amended by adding "Malta" in alphabetical order in the lists of countries under those paragraphs.

Dated: July 28, 1994.

HAROLD SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, August 4, 1994 (59 FR 39681)]

19 CFR Part 4

(T.D. 94–63)

ADDITION OF ITALY TO THE LIST OF COUNTRIES ENTITLED TO RECIPROCAL CRUISING LICENSES FOR ITS PLEASURE VESSELS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding Italy to the list of countries whose pleasure vessels may be issued U.S. cruising licenses. Customs has been informed that yachts used and employed exclusively as pleasure vessels belonging to any U.S. resident are allowed to arrive at and depart from Italian ports and cruise in the waters of Italy without being subjected to formal entry and clearance procedures. Therefore, Customs is extending reciprocal entry and clearance procedures to Italian-flag pleasure vessels.

EFFECTIVE DATE: These reciprocal privileges became effective for Italy on March 11, 1994. This amendment is effective August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Barbara Whiting, Carrier Rulings Branch, 202–482–6940.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 4.94(a), Customs Regulations (19 CFR 4.94(a)), provides that U.S. documented vessels with a recreational endorsement, that are used exclusively for pleasure and not engaged in any trade and that do not violate the U.S. Customs or navigation laws, may proceed from port to port in the U.S. or to foreign ports without entering and clearing, provided they have not visited a hovering vessel. However, when returning from a foreign port or place, such pleasure vessels are required to report their arrival pursuant to § 4.2, Customs Regulations (19 CFR 4.2).

Foreign-flag yachts entering the U.S. are generally required to comply with the laws applicable to foreign vessels arriving at, departing from, and proceeding between ports of the U.S. See, for example, § 433, Tariff Act of 1930, as amended (19 U.S.C. 1433). However, § 4.94(b), Customs Regulations (19 CFR 4.94(b)), provides that pleasure vessels from certain countries found to exempt U.S. pleasure vessels from certain formal Customs procedures may be issued cruising licenses that reciprocally exempt them from similar, U.S. formal entry and clearance procedures *(e.g.,* filing manifests, obtaining permits to proceed, and paying entry and clearance fees). Then, upon arrival at each U.S. port of entry, the masters of such licenses vessels simply report the fact of arrival to the appropriate Customs office. Also, yachts or pleasure vessels not carry-

ing passengers or merchandise in trade are exempt from paying tonnage tax and light money pursuant to § 4.21(b)(5), Customs Regulations (19 CFR 4.21(b)(5)). The list of such countries that have been granted reciprocal Customs privileges is set forth at § 4.94(b).

By diplomatic note dated January 20, 1994, the Embassy of Italy, in Washington, D.C., informed the Department of State that Italy allows U.S. yachts and other pleasure boats to arrive at and depart from Italian ports and to cruise without payment of import duties or taxes and free of import prohibitions and restrictions, subject to re-exportation and certain other conditions. By letter dated March 7, 1994, the Department of State advised the Chief, Carrier Rulings Branch, U.S. Customs Service, that the Italian treatment of U.S. pleasure vessels in Italian waters appeared to satisfy the conditions for reciprocal customs privileges and recommended that Italy be added to the list of countries under the provisions of 19 CFR 4.94(b). The Director, International Trade Compliance Division, is of the opinion that satisfactory evidence has been furnished to grant the reciprocal privileges allowed under § 4.94(b), effective March 11, 1994, and requested that Italy be added to the list of countries enumerated at § 4.94(b).

Authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations Branch.

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT REQUIREMENTS, DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

Because this amendment merely reflects a statutory requirement that confers a benefit upon the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are not required. Furthermore, for the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1) and (3).

Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson, Regulations Branch. However, personnel from other offices of the Customs Service participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs duties and inspection, Exports, Freight, Harbors, Maritime Carriers, Oil pollution, Reporting and recordkeeping requirements, Vessels.

AMENDMENT TO THE CUSTOMS REGULATIONS

To reflect the reciprocal privileges granted to vessels registered in Italy, Part 4, Customs Regulations (19 CFR Part 4), is amended as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for Part 4 and the specific authority citation for § 4.94 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91;

* * * * * * *

Section 4.94 also issued under 19 U.S.C. 1441, 46 U.S.C. App. 104;

* * * * * * *

2. In § 4.94, paragraph (b) is amended by inserting, in appropriate alphabetical order, "Italy" in the list of countries whose yachts may be issued U.S. cruising licenses.

Dated: July 28, 1994.

HAROLD SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, August 4, 1994 (59 FR 39682)]

(T.D. 94–64)

FOREIGN CURRENCIES

Daily Rates for Countries not on Quarterly List for July 1994

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: Monday, July 4, 1994.

Greece drachma:

July 1, 1994	$0.004162
July 5, 1994	.004187
July 6, 1994	.004227
July 7, 1994	.004210
July 8, 1994	.004224
July 11, 1994	.004309
July 12, 1994	.004347
July 13, 1994	.004308
July 14, 1994	.004264
July 15, 1994	.004244
July 18, 1994	.004275
July 19, 1994	.004222
July 20, 1994	.004234
July 21, 1994	.004196
July 22, 1994	.004152
July 25, 1994	.004156
July 26, 1994	.004168
July 27, 1994	.004197
July 28, 1994	.004176
July 29, 1994	.004172

South Korea won:

July 1, 1994	$0.001237
July 5, 1994	.001235
July 6, 1994	.001235
July 7, 1994	.001236
July 8, 1994	.001236
July 11, 1994	.001236
July 12, 1994	.001236
July 13, 1994	.001236
July 14, 1994	.001236
July 15, 1994	.001235
July 18, 1994	.001234
July 19, 1994	.001234
July 20, 1994	.001236
July 21, 1994	.001237
July 22, 1994	.001237
July 25, 1994	.001239
July 26, 1994	.001241
July 27, 1994	.001241
July 28, 1994	.001241
July 29, 1994	.001241

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 1994 (continued):

Taiwan N.T. dollar:

July 1, 1994	$0.037279
July 5, 1994	.037369
July 6, 1994	.037411
July 7, 1994	.037355
July 8, 1994	.037397
July 11, 1994	.037397
July 12, 1994	.037457
July 13, 1994	.037550
July 14, 1994	.037552
July 15, 1994	.037628
July 18, 1994	.037608
July 19, 1994	.037608
July 20, 1994	.037481
July 21, 1994	.037495
July 22, 1994	.037495
July 25, 1994	.037664
July 26, 1994	.037581
July 27, 1994	.037599
July 28, 1994	.037621
July 29, 1994	.037621

Dated: August 2, 1994.

GERALDYNE WECHSLER,
(for Michael Mitchell, Chief,
Customs Information Exchange.)

(T.D. 94–65)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR JULY 1994

There were no variances from the quarterly rates for July 1994.

Dated: August 2, 1994.

GERALDYNE WECHSLER,
(for Michael Mitchell, Chief,
Customs Information Exchange.)

U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 8–1994)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of June 1994 follow. The last notice was published in the CUSTOMS BULLETIN on June 29, 1994.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: July 28, 1994.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

07/26/94
08:29:46

U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN JUNE 1994

PAGE 1
DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9400123	19940601	20140601	MICROSOFT WINDOWS NT, VERSION 3.1	MICRSOFT CORPORATION	N
COP9400137	19940601	20140601	MICROSOFT WINDOWS NT ADVANCED SERVER, VERSION 3.1	MICROSOFT CORPORATION	N
COP9400138	19940601	20140601	MICROSOFT WINDOWS FOR WORKGROUPS, VERSION 3.1	MICROSOFT CORPORATION	N
COP9400139	19940603	20140603	12" COLORFUL KIDS	HONG KONG CITY TOY FACTORY, LTD.	N
COP9400140	19940603	20140603	17" COLORFUL KIDS	HONG KONG CITY TOY FACTORY, LTD.	N
COP9400141	19940603	20140603	SPLASHIN' PALS	HONG KONG CITY TOY FACTORY, LTD.	N
COP9400142	19940613	20140613	DESIGN FOR MAJOR LEAGUE SOCCER LOGO	MAJOR LEAGUE PROFESSIONAL SOCCER	N
COP9400143	19940613	20140613	STRETCH ARMSTRONG	CAP TOYS, INC.	N
COP9400144	19940613	20140613	STRETCH ARMSTRONG	CAP TOYS, INC.	N
COP9400145	19940613	20140613	PATTERN NO. 8186	CONCORD FABRICS, INC.	N
COP9400146	19940613	20140613	STARFOX (SNES)	NINTENDO OF AMERICA INC.	N
COP9400147	19940613	20140613	EC-570	SUNMEX IMPORT CORP.	N
COP9400148	19940616	20140616	#622729 OLDER AND YOUNGER FAMILY FIGURINE	ENESCO CORPORATION	N
COP9400149	19940616	20140616	#622710 WRAPPED IN CHRISTMAS TRIM FIGURINE	ENESCO CORPORATION	N
COP9400150	19940616	20140616	#622737 DEER WITH TOY BAG FIGURINE	ENESCO CORPORATION	N
COP9400151	19940616	20140616	#622745 CAROLLER MUSICAL	ENESCO CORPORATION	N
COP9400152	19940616	20140616	#651141 WITH FUZZY SOCK FIGURINE	ENESCO CORPORATION	N
COP9400153	19940616	20140616	#651168 TOBOGGAN FIGURINE	ENESCO CORPORATION	N
COP9400154	19940616	20140616	#651176 ON SKATES FIGURINE	ENESCO CORPORATION	N
COP9400155	19940616	20140616	#651184 COUPLE SNUGGLING FIGURINES	ENESCO CORPORATION	N
COP9400156	19940616	20140616	#651451 WITH COOKIES FIGURINES	ENESCO CORPORATION	N
COP9400157	19940616	20140616	#627690 COW GIRL WITH HEN IN LAP FIGURINE	ENESCO CORPORATION	N
COP9400158	19940616	20140616	#627704 BOY DRESSED AS COWBOY FIGURINE	ENESCO CORPORATION	N
COP9400159	19940616	20140616	#627712 COW BOY WITH CORN AND ROOSTER FIGURINE	ENESCO CORPORATION	N
COP9400160	19940616	20140616	#627720 COW GIRL IN FIELD WITH HAY FIGURINE	ENESCO CORPORATION	N
COP9400161	19940616	20140616	#627739 GIRL WITH PIG AND COOKIES FIGURINES	ENESCO CORPORATION	N
COP9400162	19940616	20140616	#627747 GIRL WITH PIG, HEN AND CAKE FIGURINE	ENESCO CORPORATION	N
COP9400163	19940616	20140616	#627755 COW GIRL WITH PONY AND HORSESHOE FIGURINE	ENESCO CORPORATION	N
COP9400164	19940616	20140616	#627763 GIRL WITH BABY COW READING FIGURINE	ENESCO CORPORATION	N
COP9400165	19940616	20140616	#628514 SUNFLOWER FIGURINE SIGNAGE PLAQUE	ENESCO CORPORATION	N
COP9400166	19940616	20140616	#628840 COW GIRL WITH HEN AND CHICKS FIGURINE	ENESCO CORPORATION	N
COP9400167	19940616	20140616	#628859 GIRL WITH BLUE RIBBON FIGURINE	ENESCO CORPORATION	N
COP9400168	19940623	20140623	KEN GRIFFEY JR. PRESENTS MAJOR LEAGUE BASEBALL, SUPER	NINTENDO OF AMERICA	N
COP9400169	19940623	20140623	METAL COMBAT: FALCON'S REVENGE (SNES)	NINTENDO OF AMERICA	N
COP9400170	19940623	20140623	VEGAS STAKES (SNES)	NINTENDO OF AMERICA	N
COP9400171	19940624	20140624	BATMAN RETURNS	KONAMI AMERICA INC.	N
COP9400172	19940624	20140624	RAGING FIGHTER	KONAMI AMERICA INC.	N
COP9400173	19940624	20140624	TINY TOON ADVENTURES 2 MONTANA'S MOVIE MADENESS	KONAMI AMERICA INC.	N
COP9400174	19940624	20140624	METAMORPHIC FORCE	KONAMI AMERICA INC.	N
COP9400175	19940624	20140624	CYBERNATOR	KONAMI INC.	N
COP9400176	19940624	20140624	MARTIAL CHAMPION	KONAMI AMERICA INC.	N
COP9400177	19940624	20140624	KONAMI'S SOCCER	KONAMI AMERICA INC.	N
COP9400178	19940624	20140624	VIOLENT STORM	KONAMI AMERICA INC.	N
COP9400179	19940624	20140624	TEENAGE MUTANT NINJAS TURTLES III RADICAL RESCUE	KONAMI AMERICA INC.	N
COP9400180	19940624	20140624	TEENAGE MUTANT NINJA TURTLES TOURNAMENT FIGHTERS	KONAMI AMERICA INC.	N
COP9400181	19940624	20140624	RUN AND GUN	KONAMI AMERICA INC.	N
COP9400182	19940624	20140624	GAIAPOLIS	KONAMI AMERICA INC.	N
COP9400183	19940624	20140624	WORLD CUP ' 94 FINAL LOGO	WORLD CUP USA 1994, INC.	N
COP9400184	19940629	20140629	MORTAL KOMBAT II	MIDEWAY MANUFACTURING COMPANY	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9400185	19940629	20140629	MORTAL KOMBAT II	MIDEWAY MANUFACTURING COMPANY	N
COP9400186	19940630	20140630	PATTERN 1268	AMERICAN FABRIC COMPANY WEST INC	N
COP9400187	19940630	20140630	WAVING SANTA	ROBERT POWELL ASSOCIATES	N
COP9400188	19940630	20140630	SNOWMAN WITH TOP HAT & BROOM	ROBERT POWELL ASSOCIATES	N
COP9400189	19940630	20140630	SUPER ROBOTIC RANGER ON SKATEBOARD	HIP YICK INTERNATIONAL	N
COP9400190	19940630	20140630	TICKLES	ASHTON-DRAKE GALLERIES, LTD.	N
SUBTOTAL RECORDATION TYPE			55		
TMK9400314	19940601	20020908	DESIGN OF A BOTTLE CONFIGURATION	CALVIN KLEIN COSMETICS CORPORATI	N
TMK9400318	19940601	20030427	DETAILS BY JONATHAN STRONG	FISHMAN & TOBIN	Y
TMK9400319	19940603	20040419	ENVIRO-MAG	AMERICAN PREMIER, INC.	N
TMK9400320	19940603	20090103	CTA DESIGN	CTA MANUFACTURING CORPORATION	N
TMK9400321	19940603	20020825	RITE-FIT	CTA MANUFACTURING CORPORATION	N
TMK9400322	19940603	20010505	CROSS & SHIELD DESIGN	SWISS ARMY BRANDS, LTD.	Y
TMK9400323	19940603	20010305	CROSS & SHIELD DESIGN	SWISS ARMY BRANDS, LTD.	Y
TMK9400324	19940603	20090131	MINIBASIX	IMPACT IMPORTS INTERNATIONAL, IN	Y
TMK9400325	19940610	20080927	ADIGE	NADINE LEVENSON	Y
TMK9400326	19940610	20030629	MIX	CARDINAL BUSINESS MEDIA	N
TMK9400327	19940610	20001216	THE MIX	CARDINAL BUSINESS MEDIA	N
TMK9400328	19940610	20031016	BIG RED WRAPPER DESIGN	WM. WRIGLEY JR. COMPANY	N
TMK9400329	19940610	20030213	WRIGLEY'S SPEARMINT WRAPPER DESIGN	WM. WRIGLEY JR. COMPANY	N
TMK9400330	19940610	20081011	ITEMS INTERNATIONAL & DESIGN	ITEMS INTERNATIONAL, INC.	N
TMK9400331	19940610	20030727	AUSTRALIAN GARDEN	OCEAN GARDEN PRODUCTS INC.	Y
TMK9400332	19940613	19970927	KREEPY KRAULY	KREEPY KRAULY USA, INC.	Y
TMK9400333	19940613	20040111	JEFF HAMILTON	JH DESIGN GROUP INC.	N
TMK9400334	19940613	20030410	JUICY FRUIT WRAPPER DESIGN	WM. WRIGLEY JR. COMPANY	N
TMK9400335	19940613	20030410	DOUBLEMINT WRAPPER DESIGN	WM. WRIGLEY JR. COMPANY	N
TMK9400336	19940613	20030323	XS DE PACO RABANNE	PACO RABANNE PARFUMS S.A.	N
TMK9400337	19940613	20000811	PACO RABANNE	PACO RABANNE PARFUMS S.A.	N
TMK9400338	19940613	20000224	CALANDRE	PACO RABANNE PARFUMS S.A.	N
TMK9400339	19940613	20080216	POTER	PORTER TOYS CO., LTD.	N
TMK9400340	19940613	20081011	SAFESKIN	SAFESKIN CORPORATION	N
TMK9400341	19940613	20020114	VIGNETTE	SWELL-WEAR INC.	Y
TMK9400342	19940613	20030413	FIRST CLASS KIDS	SWELL-WEAR INC.	Y
TMK9400343	19940613	20030906	RAINSKINS	SWELL-WEAR INC.	Y
TMK9400344	19940613	20080216	THE SENATE CLUB	SWELL-WEAR INC.	Y
TMK9400345	19940613	20090131	MELANGE	SWELL-WEAR INC.	Y
TMK9400346	19940613	20050730	MATRIX	SWELL-WEAR INC.	Y
TMK9400348	19940613	20080126	SWI SWELL-WEAR INDUSTRIES & DESIGN	SWELL-WEAR INC.	Y
TMK9400349	19940615	20031228	CONQUISTADOR	CREST INTERNATIONAL CORP.	Y
TMK9400350	19940615	19991218	ZIG ZAG	BOLLORE TECHNOLOGIES S.A.	N
TMK9400351	19940615	19950816	ZIG ZAG	BOLLORE TECHNOLOGIES S.A.	N
TMK9400352	19940615	20030809	MISCELLANEOUS DESIGN	BOLLORE TECHNOLOGIES S.A.	N
TMK9400353	19940615	20040111	LIGHTENING BOLT DESIGN	EASTMAN MACHINE COMPANY	N
TMK9400354	19940623	20040426	WORLD CUP 94	WORLD CUP USA 1994	N
TMK9400355	19940623	20040426	MASCOT DESIGN	WORLD CUP USA 1994	N
TMK9400356	19940623	20030615	NATURAL GREEN LEAF BRAND FOR WOMEN & MEN DIETERS HERBAL	SUNNY WONG DBA PC TEAS CO.	N
TMK9400357	19940623	20050212	MOHINDER & DESIGN	MOHINDER SPORTS, INC.	Y

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9400358	19940624	20010326	GREEN MOUNTAIN COFFEE ROASTERS	GREEN MOUNTAIN COFFEE ROASTERS	N
TMK9400359	19940624	20031123	NANTUCKET BLEND	GREEN MOUNTAIN COFFEE ROASTERS	N
TMK9400360	19940624	19950715	KENT WITH DESIGN	BROWN & BIGELOW INC.	N
TMK9400361	19940624	20040111	JEFF HAMILTON	JH DESIGN GROUP INC.	N
TMK9400362	19940624	20040125	TOWNE	LONDON FOG INDUSTRIES	Y
TMK9400363	19940624	20080130	TOWER DESIGN	LONDON FOG INDUSTRIES	Y
TMK9400364	19940624	20081015	LONDON FOG	LONDON FOG INDUSTRIES	Y
TMK9400365	19940624	19990828	FOG	LONDON FOG INDUSTRIES	Y
TMK9400366	19940624	20010929	LONDON FOG TOWER DESIGN	LONDON FOG INDUSTRIES	Y
TMK9400367	19940629	20030730	CIRCULAR WIDE GOLD BAND	INDRESCO INC.	N
TMK9400368	19940629	20030611	CIRCULAR NARROW GOLD BAND	INDRESCO INC.	N
TMK9400369	19940629	20031214	TRUEVU	TRUEVISION, INC.	N
TMK9400370	19940629	20090404	FIVEBROTHER	M. FINE & SONS MFG., CO., INC.	Y
TMK9400371	19940629	20050416	ECUADORIAN GARDEN	OCEAN GARDEN PRODUCTS, INC.	Y
TMK9400372	19940629	20020310	PRIDE OF GUATEMALA	OCEAN GARDEN PRODUCTS, INC.	Y
TMK9400373	19940630	20080823	802	BOSE CORPORATION	N
TMK9400374	19940630	20011022	ZERO	FAIRFIELD LINE, INC.	N
TMK9400375	19940630	20031123	NDC LOGO DESIGN	NATIONAL DATACOMM CORP	N
TMK9400376	19940630	20040125	GENIUS	SHARP INTERNATIONAL CORP.	Y

SUBTOTAL RECORDATION TYPE 59

TOTAL RECORDATIONS ADDED THIS MONTH 114

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of calculation and interest.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts and refunds of Customs duties. For the quarter beginning July 1, 1994, the rates will be 7 percent for overpayments and 8 percent for underpayments. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: John V. Accetturo, U.S. Customs Service, National Finance Center, Revenue Accounting Branch, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298–1308.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Interest rates are determined based on the short-term Federal rate. The interest rate that Treasury pays on overpayments will be the short-term Federal rate plus two percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus three percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service on behalf of the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less, and fluctuate quarterly. The rates effective for a quarter are determined during the first month period of the previous quarter. The rates of interest for the period of July 1, 1994—September 30, 1994, are 7 percent for overpayments and 8 percent for underpayments. These rates will remain in effect through September 30, 1994, and are subject to change on October 1, 1994.

Dated: July 27, 1994.

GEORGE J. WEISE,
Commissioner of Customs.

[Published in the Federal Register, August 4, 1994 (59 FR 39824)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., August 1, 1994.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
(for Harvey B. Fox, Director,
Office of Regulations and Rulings.)

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF JEWELRY BOXES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of textile covered jewelry boxes used in the retail sale of jewelry. Notice of the proposed revocation was published June 22, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 25.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after October 17, 1994.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Office of Regulations and Rulings, Textile Classification Branch (202–482–7050).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 22, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 25, proposing to revoke New York Ruling Letter (NYRL) 835631, issued January 25, 1989, by the Area Director of Customs, New York Seaport. The ruling concerned the tariff classification of textile covered metal jewelry boxes used in the retail sale of jewelry in subheading 7310.29.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). No comments were received.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the

North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), (hereinafter, section 625), this notice advises interested parties that Customs is revoking NYRL 835631 to reflect proper classification of the textile covered jewelry boxes in subheading 4202.92.9015, HTSUSA, which provides for textile covered jewelry boxes of a kind normally sold at retail with their contents. Copies of NYRL 835631 and the ruling letter revoking NYRL 835631 are set forth as Attachments A and B, respectively.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 25, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, N.Y., January 25, 1989.

CLA–2–73:S:N:1:113 835631
Category: Classification
Tariff No. 7310.29.0000

MR. WILLIAM J. LECLAIR
TRANS-BORDER CUSTOMS SERVICES
One Trans-Border Drive
P.O. Box 800
Champlain, New York 12919

Re: The tariff classification of textile covered metal jewelry boxes from Canada.

DEAR MR. LECLAIR:

In your letter dated January 10, 1989, you requested a tariff classification ruling on behalf of Impenco Ltd of Montreal, Quebec, Canada.

The items are cloth covered jewelry boxes used by retailers to display and market items of jewelry. These boxes come in various sizes depending upon the article of jewelry to be placed therein. The component of predominant weight of each item is metal, accounting for approximately 86 percent of the total weight of the box.

The applicable subheading for the jewelry boxes will be 7310.29.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for other boxes used as sales packing and for the commercial conveyance of goods, of a capacity less than 50 liters, of iron or steel. The rate of duty will be free.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter would be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., July 25, 1994.
CLA–2 CO:R:C:T 955789 BC
Category: Classification
Tariff No. 4202.92.9015

WILLIAM J. LECLAIR
TRANS-BORDER CUSTOMS SERVICES
One Trans-Border Drive
P.O.Box 800
Champlain, New York 12919

Re: Revocation of New York Ruling Letter 835631; classification of textile covered metal jewelry boxes used in the retail sale of jewelry and other items; Headquarters Ruling Letter 951028.

DEAR MR. LECLAIR:

The Customs Service has had reason to reexamine the classification determination in New York Ruling Letter (NYRL) 835631, dated January 25,1989, issued to Trans-Border Customs Services on behalf of Impenco Ltd. of Montreal, Quebec, Canada. We herein revoke that ruling as set forth below.

Facts:

In NYRL 835631, issued on January 25, 1989, Customs classified textile covered metal jewelry boxes used by retailers to display and sell items of jewelry. The boxes come in various sizes and shapes, depending on the article of jewelry to be placed inside. Customs classified the jewelry boxes in subheading 7310.29.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provided for other boxes used as sales packing and for the commercial conveyance of goods, of a capacity less than 50 liters, of iron or steel. We have reviewed NYRL 835631, and, finding it to be in error, we herein revoke it in accordance with section 177.9(d) of the Customs Regulations (19 CFR 177.9(d)). Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter, section 625), notice of the proposed revocation of NYRL 835631 was published on June 22, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 25.

Issue:

What is the proper classification for the subject textile covered jewelry boxes?

Law and Analysis:

In Headquarters Ruling Letter (HRL) 951028, issued on March 3, 1993, we classified jewelry boxes of the kind at issue in NYRL 835631 as "jewelry boxes" under heading 4202, HTSUSA. That ruling cited the following Explanatory Note (EN), which makes clear that specially designed and shaped jewelry boxes used in the retail sale of jewelry and similar items are included within the scope of the term "jewelry boxes" as it appears in heading 4202, HTSUSA:

> The term "jewelry boxes" covers not only boxes specially designed for keeping jewelry, but also similar lidded containers of various dimensions (with or without hinges or fasteners) specially shaped or fitted to contain one or more pieces of jewelry and normally lined with textile material, of the type in which articles of jewelry are presented and sold and which are suitable for long-term use.

The ruling stated the following regarding the above EN:

> This language makes it clear that cases used in the presentation and sale of jewelry are included in the term "jewelry boxes" in heading 4202. Because these cases are "jewelry boxes," cases used in the presentation and sale of other articles are "similar containers" as that phrase appears in the heading. Thus, cases of the kind at issue—whether they are used ultimately to hold an item of jewelry, pen and pencil set, perfume bottle, or various other articles—are classifiable under heading 4202.

It is clear that the jewelry boxes classified in NYRL 835631 are the kind described in the above EN. As such, they are classifiable under heading 4202, HTSUSA, not under heading 7310, HTSUSA.

Holding:

The textile covered metal jewelry boxes classified in New York Ruling Letter 835631 as other boxes of iron or steel under subheading 7310.29.0000, HTSUSA, are classifiable instead as textile covered jewelry boxes of a kind normally sold at retail with their contents under subheading 4202.92.9015, HTSUSA. The applicable duty rate is 20% *ad valorem.*

Pursuant to 19 CFR 177.9(d) NYRL 835631, dated January 25, 1989, is hereby revoked.

In accordance with section 625, this ruling will become effective 60 days from the date of its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF CALCINED FIRECLAY P

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of Calcined Fireclay P. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before September 16, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C., 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Kathleen Clarke, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested par-

ties that Customs intends to revoke a ruling pertaining to the tariff classification of Calcined Fireclay P.

In New York (NY) 886711 dated September 28, 1993, the Area Director, New York Seaport, classified Calcined Fireclay P under subheading 3816.00.00, HTSUS, as refractory cements, mortars, concretes and similar compositions. NY 886711 was based on Customs Laboratory Report No. 2–93–21860 which determined that the Calcined Fireclay P had the properties of a calcined clay and was suitable as a mortar material or high temperature furnace liner. This ruling letter is set forth in Attachment A to this document.

It has recently come to Customs Headquarters attention that the Customs Laboratory has reversed its original position and in Customs Laboratory Report No. 2–94–20732 determined that the Calcined Fireclay P is not a refractory mortar because it does not meet the definition of "refractory" found in Additional U.S. Note 2, Chapter 69, HTSUS. Therefore, Customs Headquarters is of the opinion that the Calcined Fireclay P is not classified under subheading 3816.00.00, HTSUS, as refractory cements, mortars, concretes and similar compositions.

Customs intends to revoke NY 886711 to reflect the proper classification of the Calcined Fireclay P under subheading 6815.99.40, HTSUS, as other articles of stone or of other mineral substances, not elsewhere specified or included. Proposed Headquarters ruling 956708 revoking NY 886711 is set forth in Attachment B to this document. Before taking action on the above ruling, consideration will be given to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 29, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, N.Y., September 28, 1993.

CLA–2–38:S:N:N3:226 888075
Category: Classification
Tariff No. 3816.00.0010

MR. DAVID WALSER
ARTHUR J. HUMPHREYS DIV.
BORDER BROKERAGE CO., INC.
P.O. Box 249
Sumas, Washington 98295

Re: The tariff classification of Fireclay from Canada.

DEAR MR. WALSER:

This is in response to your request for a tariff classification ruling, on behalf of your client, Clayburn Industries Ltd., dated May 24, 1993.

The sample which you have submitted (Calcined Fireclay P.) is a powdered substance which you state has been *"formulated* for aluminum electrolytic cells as a bedding layer under the carbon cathodes." Your diagram and technical data sheet indicate that the product is a protective "sealing layer for brick pots. We have submitted the sample to the Customs Laboratory. The lab has determined that the item has the properties of a calcined clay and is suitable as a mortar material or high temperature furnace liner. Since you have stated that the fireclay is formulated", we presume that it is artificially created.

The provision applicable to the Calcined Fireclay P will be subheading 3816.00.0010, Harmonized Tariff Schedule of the United States (HTS), which provides for Refractory cements, mortars, concretes and similar compositions, other than products of heading 3801: Clay. The rate of duty will be 3 percent ad valorem.

Goods classifiable under subheading 3816.00.0010, HTS, which have originated in the territory of Canada, will be entitled to a Free rate of duty under the United States–Canada Free Trade Agreement (FTA) upon compliance with all applicable regulations.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.

CLA-2 CO:R:C:M 956708 KCC
Category: Classification
Tariff No. 6815.99.40

MR. DAVID WALSER
ARTHUR J. HUMPHREYS DIV.
BORDER BROKERAGE CO., INC.
P.O. Box 249
Sumas, Washington 98295

Re: NY 886711 revoked; Calcined Fireclay P; 3816.00.00; refractory; Additional U.S. Note 2, Chapter 69.

DEAR MR. WALSER:

This is in reference to (New York) NY 886711 issued to you on September 28, 1993, on behalf of Clayburn Industries Ltd., which concerned the tariff classification of Calcined Fireclay P under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The Calcined Fireclay P, at issue in NY 886711, was described as follows:

> * * * a powdered substance which you state has been *"formulated"* for aluminum electrolytic cells as a bedding layer under the carbon cathodes. Your diagram and technical data sheet indicate that the product is a protective "sealing layer" for brick pots.

In NY 886711, the Area Director, New York Seaport, classified the Calcined Fireclay P under subheading 3816.00.00, HTSUS, as refractory cements, mortars, concretes and similar compositions. NY 886711 was based on Customs Laboratory Report No. 2-93-21860-001 dated July 8, 1993, which determined that the Calcined Fireclay P

> * * * is a formulated powder composed of the oxides and silicates of aluminum and iron. It has the properties of calcined clay and is suitable as a mortar material or high temperature furnace liner.

Issue:

Is the Calcined Fireclay P classified under subheading 3816.00.00, HTSUS, as refractory cements, mortars, concretes and similar compositions?

Law and Analysis:

Subheading 3816.00.00, HTSUS, provides for "Refractory cements, mortars, concretes and similar compositions, other than products of heading 3801 * * *." The term "refractory" is not defined in Chapter 38 or Section VI, HTSUS. However, Additional U.S. Note 2, Chapter 69, HTSUS, states that:

> * * * *"refractory"* is applied to articles which have a pyrometric cone equivalent of at least 1500 degrees Celsius when heated at 60 degrees Celsius per hour (pyrometric cone 18). Refractory articles have special properties of strength and resistance to thermal shock and may also have, depending upon the particular uses for which designed, other special properties such as resistance to abrasion and corrosion.

Tariff terms are required to be interpreted consistently where they appear throughout the tariff schedule. Therefore, since the term "refractory" is not defined in Chapter 38 or Section VI, HTSUS, we feel that turning to Chapter 69, HTSUS, for a definition of "refractory" is proper.

Customs Laboratory Report No. 2-93-21860-001 dated July 8, 1993, which determined that the Calcined Fireclay P had "* * * properties of calcined clay and is suitable as a mortar material or high temperature furnace liner", did not test the Calcined Fireclay P pursuant to the definition of "refractory" in Additional U.S. Note 2, Chapter 69, HTSUS.

After examining the testing procedure for refractory mortars, the Office of Laboratories and Scientific Services issued a memorandum to all Laboratory Directors on July 26, 1993, detailing a standard testing procedure for refractory mortars. The Office of Laboratories and Scientific Services thoroughly reviewed the different testing methods and

requirements of refractory mortars, as well as the various technological definitions of refractory, and determined that refractory mortars are tested and classified by the American Society of Testing Materials (ASTM) using different methods and requirements. Therefore, in the interest of interpreting the tariff terms consistently, the Office of Laboratories and Scientific Services determined that the definition of "refractory" in Additional U.S. Note 2, Chapter 69, HTSUS, was an acceptable definition for the term "refractory mortars" of heading 3816, HTSUS.

An amended Customs Laboratory Report No. 2–94–20732–001 dated January 20, 1994, found that the Calcined Fireclay P failed to meet the definition of "refractory" in Additional U.S. Note 2, Chapter 69, HTSUS. Therefore, the Calcined Fireclay P is not classified under subheading 3816.00.00, HTSUS, as refractory cements, mortars, concretes and similar compositions.

As the Calcined Fireclay P is a formulated powder composed of oxides and silicates of aluminum and iron, it is classified under subheading 6815.99.40, HTSUS, which provides for "Articles of stone or of other mineral substances (including articles of peat), not elsewhere specified or included * * * Other articles * * * Other * * * Other."

Holding:

The Calcined Fireclay P is classified under subheading 6815.99.40, HTSUS, as other articles of stone or of other mineral substances, not elsewhere specified or included.

NY 886711 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF X-RAY ABSORPTION FILTERS

ACTION: Notice of proposed revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of X-ray absorption filters. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before September 16, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C., 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Kathleen Clarke, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of X-ray absorption filters.

In New York (NY) 860125 and NY 860126 dated February 26, 1991, the Area Director, New York Seaport, classified the "Boomerang" and "Bullion" X-ray absorption filters under subheading 4016.99.50, HTSUS, as other articles of vulcanized rubber other than hard rubber. NY 860125 is set forth in Attachment A, and NY 860126 is set forth in Attachment B to this document.

Customs Headquarters is of the opinion that the X-ray absorption filters do not meet the definition of "rubber" or "synthetic rubber" in Note 1 and 4(a), Chapter 40, HTSUS, and, therefore, are not classifiable under subheading 4016.99.50, HTSUS. The X-ray absorption filters are designed to increase the quality of an X-ray, thereby contributing to the effectiveness of an X-ray apparatus. Therefore, the "Boomerang" and "Bullion" X-ray absorption filters are accessories of apparatus based on the use of X-rays under subheading 9022.90.60, HTSUS.

Customs intends to revoke NY 860125 and NY 860126 to reflect the proper classification of the "Boomerang" and "Bullion" X-ray absorption filters under subheading 9022.90.60, HTSUS, as other parts and accessories of apparatus based on the use of X-rays. Proposed Headquarters ruling 956575 revoking NY 860125 and 860126 is set forth in Attachment C to this document. Before taking action on the above rulings, consideration will be Given to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 28, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, N.Y., February 26, 1991.

CLA–2–40:S:N:N3G:221 860125
Category: Classification
Tariff No. 4016.99.5050

MS. ANN M. WILLIAMS
A.N. DERINGER, INC.
30 West Service Road
Champlain, New York 12919–9703

Re: The tariff classification of a rubber filter from Canada.

DEAR MS. WILLIAMS:

In your letter dated January 29, 1991, on behalf of Octostop Enterprises, Inc., you requested a tariff classification ruling.

The filter, known as the "Bullion," is composed of silicone rubber. It is used for penetration/protection during x-ray, and is placed on the appropriate part of the body to assist radiologists in taking x-rays.

The applicable subheading for the Bullion rubber filter will be 4016.99.5050, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of vulcanized rubber other than hard rubber, other. The rate of duty will be 5.3 percent ad valorem.

Goods classifiable under subheading 4016.99.5050, HTS, which have originated in the territory of Canada, will be entitled to a 3.7 percent ad valorem rate of duty under the United States–Canada Free Trade Agreement (FTA) upon compliance with all applicable regulations.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, N.Y., February 26, 1991.

CLA–2–42:S:N:N3G:221 860126
Category: Classification
Tariff No. 4016.99.5050

MS. ANN M. WILLIAMS
A.N. DERINGER, INC.
30 West Service Road
Champlain, New York 12919–9703

Re: The tariff classification of a rubber absorption filter from Canada.

DEAR MS. WILLIAMS:

In your letter dated January 29, 1991, on behalf of Octostop Enterprises, Inc., you requested a tariff classification ruling.

The absorption filter, known as the "Boomerang," is composed of silicone rubber. It is placed on the appropriate area of the body, such as the shoulder, to assist radiologists in taking x-rays.

The applicable subheading for the Boomerang rubber filter will be 4016.99.5050 Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of vulcanized rubber other than hard rubber, other. The rote of duty will be 5.3 percent ad valorem.

Goods classifiable under subheading 4016.99.5050, HTS, which have, originated in the territory of Canada, will be entitled to a 3.7 percent ad valorem rate of duty under the United States-Canada Free Trade Agreement (FTA) upon compliance with all applicable regulations.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.

CLA–2 CO:R:C:M 956575 KCC
Category: Classification
Tariff No. 9022.90.60

MS. ANN N. WILLIAMS
A.N. DERINGER, INC.
30 West Service Road
Champlain, New York 12919–9703

Re: NY 860125 and NY 860126 revoked; "Bullion" and "Boomerang" X-ray absorption filters; 4016.99.50; Note 1 and 4(a), Chapter 40; rubber; synthetic rubber; accessories; Note 2(b), Chapter 90; apparatus based on the use of X-rays; HRL 087704 and 955025.

DEAR MS. WILLIAMS:

This is in reference to (New York) NY 860125 and NY 860126 issued to you on February 26, 1991, on behalf of Octostop Enterprises, Inc., which concerned the tariff classification of X-ray absorption filters under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

NY 860125 classified the "Bullion", and NY 860126 classified the "Boomerang" under subheading 4016.99.50, HTSUS, as other articles of vulcanized rubber other than hard rubber. The "Bullion" and "Boomerang" are silicone rubber compensating filters used to even out the density of an X-ray film which would otherwise be highly over penetrated or under penetrated. These articles are placed on the appropriate area of the body, such as the shoulder, to assist radiologists in taking X-rays.

Issue:

Whether the "Bullion" and "Boomerang" X-ray absorption filters are classified under subheading 4016.99.50, HTSUS, as other articles of vulcanized rubber other than hard rubber.

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to terms of the headings and any relative section or chapter notes * * *."

Subheading 4016.99.50, HTSUS, provides for "Other articles of vulcanized rubber other than hard rubber * * * Other * * * Other * * * Other * * * Other * * *." The expression "rubber" means the following products, whether or not vulcanized or hard: natural rubber, balata, gutta-percha, guayule, chicle and similar natural gums, synthetic rubber, factice derived from oils and such substances reclaimed. Note 1, Chapter 40(a), HTSUS. Note 4, Chapter 40, HTSUS, states that the expression "synthetic rubber" applies to:

> Unsaturated synthetic substances which can be irreversibly transformed by vulcanization with sulfur into non-thermoplastic substances which, at a temperature between 18 degrees Celsius and 29 degrees Celsius, will not break on being extended to three times their original length and will return, after being extended to twice their original length, within a period of 5 minutes, to a length not greater than 1½ times their original length. For the purposes of this test, substances necessary for the cross-linking, such as vulcanizing activators or accelerators, may be added; the presence of substances as provided for by note 5(b)(ii) and (iii) is also permitted. However, the presence of any substances not necessary for the cross-linking, such as extenders, plasticizers and fillers, is not permitted * * *.

Silicone cannot be cross-linked with sulfur. Therefore, the silicone rubber X-ray absorption filers, "Bullion" and "Boomerang", do not meet the definitions of "synthetic rubber" or "rubber" in the notes to Chapter 40, HTSUS. The X-ray absorption filters are considered to be plastic material for tariff classification purposes. The "Bullion" and "Boomerang" X-ray absorption filters cannot be classified as a rubber in Chapter 40, HTSUS.

Heading 9022, HTSUS, provides for:

> Apparatus based on the use of X-rays or of alpha, beta or gamma radiations, whether or not for medical, surgical, dental or veterinary uses, including radiography or radiotherapy apparatus, X-ray tubes and other X-ray generators, high tension generators, control panels and desks, screens, examination or treatment tables, chairs and the like; parts and accessories thereof * * *.

With regard to the classification of parts and accessories for machines, apparatus, instruments or articles of Chapter 90, HTSUS, Note 2, Chapter 90, HTSUS, provides as follows:

> (a) Parts and accessories which are goods included in any of the headings of this chapter or of chapter 84, 85 or 91 * * * are in all cases to be classified in their respective headings;
>
> (b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading * * * are to be classified with the machines, instruments or apparatus of that kind;
>
> (c) All other parts and accessories are to be classified in heading 9033.

Because the "Bullion" and "Boomerang" X-ray absorption filters are not goods included in any heading of Chapter 84, 85, 90 or 91, HTSUS, it is necessary to resort to Note 2(b), Chapter 90, HTSUS. Octostop contends that the articles at issue are specially designed accessories that are solely or principally used with the apparatus of heading 9022, HTSUS.

The term "accessory" is not defined in either the tariff schedule or the Explanatory Notes of the Harmonized Commodity Description and Coding System. An accessory is generally an article which is not necessary to enable the goods with which it is used to fulfill their intended function. An accessory must be identifiable as being intended solely or principally for use with a specific article. Accessories are of secondary or subordinate importance, not essential in and of themselves. They must, however, somehow contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the principal article, widen the range of its uses, or improve its operation) *See*, Headquarters Ruling Letter (HRL) 087704 dated September 27, 1990.

The "Bullion" and "Boomerang" X-ray absorption filters are not necessary to enable the X-ray apparatus with which it is used to fulfill its intended function. However, the articles at issue are designed to increase the quality of the X-ray, thereby contributing to the effectiveness of the X-ray apparatus. Based on the information presented, we are of the opinion that the "Bullion" and "Boomerang" X-ray absorption filters are principally used with the apparatus of heading 9022, HTSUS, and are, therefore, classified under subheading 9022.90.60, HTSUS, as accessories of apparatus based on the use of X-rays. *See also*, HRL 955025 dated April 29, 1994.

Holding:

The "Bullion" and "Boomerang" X-ray absorption filters are classified as other parts and accessories of apparatus based on the use of X-rays under subheading 9022.90.60, HTSUS.

NY 860125 and NY 860126 are revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF AN ILLUMINATED TREE-SHAPED CERAMIC FIGURINE

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1) of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of an illuminated tree-shaped ceramic figurine. Comments are invited, on the correctness of the proposed ruling.

DATE: Comments must be received on or before September 16, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington D.C.

FOR FURTHER INFORMATION CONTACT: Mary Beth McLoughlin, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of an illuminated tree-shaped ceramic figurine. Comments are invited on the correctness of the proposed ruling.

In District Decision (DD) 896697, issued on May 4, 1994, by the Area Director of Customs, Newark, NJ, an illuminated tree-shaped ceramic figurine was classified under subheading 6702.90.65, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Artificial

flowers, foliage and fruit and parts thereof. DD 896697 is set forth as "Attachment A" to this document.

Customs Headquarters is of the opinion that the ceramic base imparts the essential character of the figurine. Therefore, the article is classifiable under subheading 6913.90.50, HTSUS, which provides for Statuettes and other ornamental ceramic articles: Other: Other: Other.

Customs intends to revoke DD 896697 to reflect the proper classification of the figurine under this subheading. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter (HRL) 956553 revoking DD 896697 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 27, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Newark, N.J., May 4, 1994.
CLA–2–67:N:I:A:G11 896697
Category: Classification
Tariff No. 6702.90.6500

MS. MAUREEN SHOULE
J.W. HAMPTON, JR. & CO., INC.
15 Park Row
New York, N.Y. 10038

Re: The tariff classification of a battery operated Halloween tree from China.

DEAR MS. SHOULE:

In your letter dated April 8, 1994, on behalf of F.W. Woolworth Co., you requested a tariff classification ruling.

The submitted sample, item number 9878, is a battery operated Halloween tree. You have indicated that the batteries are not included. The Halloween tree consists of a metal wire trunk and metal branches. The tree is secured in a decorative ceramic painted base which resembles a tree trunk. The ceramic tree trunk also has figures of ghosts and skulls on it. Your sample is being returned as requested.

The applicable subheading for the battery operated Halloween tree will be 6702.90.6500, Harmonized Tariff Schedule of the United States (HTS), which provides for artificial flowers * * *, of other materials, other, other. The rate of duty will be 17 percent ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

KATHLEEN M. HAAGE,
Area Director,
Newark.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.

CLA-2 CO:R:C:M 956553 MMC
Category: Classification
Tariff No. 6913.90.50

MS. MAUREEN SHOULE
J.W. HAMPTON, JR. & CO., INC.
15 Park Row
New York, New York 10038

Re: Illuminated tree-shaped ceramic figurine; DD 896697 revoked; Headings 6702, 9505, 9405; ENs VIII to GRI 3(b), 67.02, 95.05, 69.13; NYRL 868459; HRLs 953189, 952890, 955527, 955647, 955529, 950041, 088233; GRI 1, 2, 3.

DEAR MS. SHOULE:

This is in reference to your letter of June 3, 1994, requesting reconsideration of DD 896697 dated May 4, 1994, in which you were advised by the Area Director of Customs, Newark, NJ, of the classification of an illuminated tree-shaped figurine under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The submitted sample, one of four available styles, is a battery operated 18 inch high illuminated figurine comprised of a metal wire assembly bound in "glow in the dark" black tape, iridescent plastic cut outs of ghosts, ghouls and specters, and an illuminated painted ceramic hollow base, shaped to resemble a tree trunk. The metal wire assembly is placed in the neck of the base and resembles the branches of a tree. The iridescent plastic cut outs attach to the metal assembly creating an illusion of ghosts in tree branches. The tree-shaped ceramic base also has ghost and skull figures molded in it. When illuminated from the inside, it appears to have an eerie glow. The box in which the article is packaged refers to it as a Halloween Tree.

In DD 896697, dated May 4, 1994, the article was held to be classifiable under subheading 6702.90.65, HTSUS, which provides for Artificial flowers, foliage and fruit and parts thereof, of other materials, other, other. You contend that it is more specifically classifiable as a festive article or as a ceramic article.

Issue:

Whether the figurine is classifiable as artificial flowers, foliage, or fruit under the HTSUS.

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes.

The headings under consideration are as follows:

6702	Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit
6913	Statuettes and other ornamental ceramic articles
9405	Lamps, and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included
9505	Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof

Note 3 to Chapter 67, HTSUS, states, in pertinent part, that:

> Heading 6702 does not cover:
>
> * * * (b) Artificial flowers, foliage or fruit of pottery, stone, metal, wood or other materials, obtained in one piece by molding, forging, carving, stamping or other process, or consisting of parts assembled otherwise than by binding, gluing, fitting into one another or similar methods.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be consulted. The ENs, although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989). EN 67.02, p. 892–893, states, in pertinent part, that:

> This heading covers:
>
> (1) Artificial flowers, foliage and fruit in forms resembling the natural products, * * *
>
> This heading does not include:
>
> (e) Artificial flowers, foliage or fruit, of pottery, stone, metal, wood, etc., obtained in one piece by moulding, forging, carving, stamping or other process, * * *
>
> (f) Wire simply cut to length and covered with textile material, paper, etc., for making stems for artificial flowers, etc.

We are of the opinion that heading 6702, HTSUS, does not describe the article in question. The article is made of ceramic and wire wrapped in tape. Therefore, Note 3 to Chapter 67, HTSUS, excludes it from classification in Chapter 67, HTSUS. Furthermore, the article is not a form which resembles a natural tree. Trees do not have skulls and ghosts surrounding them nor are they illuminated from the inside. Therefore, the figurine is not classifiable under heading 6702, HTSUS.

For a similar analysis see NYRL 868459, dated December 2, 1991, which classified a wooden tree with ornaments. Headings which were listed as describing the article, were 9505, which provides for festive articles, and 4420, HTSUS, which provides for other wooden articles. Heading 6702, HTSUS, was not considered.

EN 95.05 states, in pertinent part, that:

> This heading covers:
>
> (A) Festive, carnival or other entertainment articles, which in view of their intended use are generally made of nondurable material. They include:
>
> (1) Decorations such as festoons, garlands, Chinese lanterns, etc., as well as various decorative articles made of paper, metal foil, glass fibre, etc., for Christmas trees (e.g., tinsel, stars, icicles), artificial snow, coloured balls, bells, lanterns, etc. Cake and other decorations (e.g., animals, flags) which are traditionally associated with a particular festival are also classified here.

Customs understands this EN to indicate that heading 9505, HTSUS, provides for articles exemplified in the ENs and articles *ejusdem generis* to them. Characteristics indicative, but not conclusive, of a festive article are, if the article **as a whole:**

1. is of non-durable material or, generally, is not purchased because of its extreme worth, or intrinsic value (e.g., paper, cardboard, metal foil, glass fiber, plastic, wood);
2. functions primarily as a decoration (e.g., its primary function is not utilitarian); and
3. is traditionally associated or used with a particular festival (e.g., stockings, and tree ornaments for Christmas, decorative eggs for Easter).

An article's satisfaction of these three criteria is an indication that it is classifiable as a festive article. The motif of an article is not dispositive of its classification and consequently, does not transform an item into a festive article for tariff purposes. An article, as a whole, must be specifically affiliated with a particular festival, and not merely contain the motif of the festival. See Headquarters Ruling Letter (HRL) 953189 dated April 15, 1993, and HRL 952890 dated March 16, 1993.

Customs is of the opinion that the subject figurine functions primarily as decoration, and is not purchased for its extreme worth or value. However, we find that while the box refers to Halloween, the figurine is not traditionally associated with that particular festival.

Ghosts, ghouls, and specters are not the same types of articles cited in the ENs to heading 9505, HTSUS, as examples of traditional, festive articles, nor do they particularly relate to Halloween. Ghosts, ghouls, and specters are often the subject of mythology, history, plays, movies, and cartoons bearing no significance to a festival or holiday. For example, a variety of ghosts are the subject of the movie "Ghostbusters" and a friendly ghost is the subject of the cartoon, "Casper the Friendly Ghost". Relative to their representation of the after life, ghosts often represent the physic or paranormal. Therefore, the figurine is not classifiable as a festive article.

This is consistent with our holding in HRL 955527 dated March 1, 1994, wherein a standing witch with broom and a seagrass scarecrow were classified other than as festive articles. In that decision, Customs explained that witches and scarecrows are not associated with a particular festival but in part, are associated with, respectively, mythology, history, and a bountiful harvest. See also: HRL 955647 dated March 15, 1994, and HRL 955529 dated March 16, 1994.

Inasmuch as no provision in the HTSUS describes the illuminated figurine in its entirety, it is considered a composite good and cannot be classified according to GRI 1.

When goods cannot be classified by applying GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's are applied. GRI 2(a) states in pertinent part that:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

It is our understanding that the article is imported finished and complete, therefore GRI 2(a) does not apply.

GRI 2 (b) states, in pertinent part, that any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. The classification of goods consisting of more than one material or substance shall be according to the principles of GRI 3.

GRI 3 states that when, by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

The two remaining headings under consideration, 9405, HTSUS, which describes the lighting component and 6913, HTSUS, which describes the porcelain base, each describe part only of the materials used to make the article in question. Therefore, the headings are considered equally specific and GRI 3(b) must be applied.

GRI 3(b) states, in pertinent part, that:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

EN VIII to GRI 3(b), pg. 4, states that:

> The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

We find that the ceramic base imparts the essential character of this article. EN 69.13, p. 923, states, in pertinent part, that:

This heading covers:

> (A) Articles which have no utility value but are wholly ornamental, and articles whose only usefulness is to support or contain other decorative articles or to add to their decorative effect, e.g.:
>
> > (1) Statues, statuettes, busts, haute or bas reliefs, and other figures for interior or exterior decoration; ornaments (including those forming parts of clock sets) for mantelpieces, figures, etc.); sporting or art trophies; wall shelves, etc., (animals, symbolic or allegorical ornaments incorporating fittings for hanging (plaques, trays, plates); medallions; firescreens; artificial flowers, fruit, leaves, etc.; wreathes and similar ornaments for tombs; kick-knacks for shelves or domestic display-cabinets.

We are of the opinion that the tree figurine is wholly ornamental, because its illumination is minimal, it has little if any utility and its other features serve no purpose. It is

greater in bulk, weight or value than any other portion of the article. It appears that the lighting function simply enhances the already decorative nature of the article. Therefore, the article will not be purchased, primarily, for its lighting characteristics.

This finding is consistent with HRL 950041, dated October 31, 1991, which held that the lighting component in the "Little Village Collection" merely enhanced the already decorative nature of the article and was not its essential character. Likewise, in HRL 088233, dated May 1, 1991, we held that the lighting portion of a mirror merely enhanced the mirror's function and was not the article's essential character. See also, HRL 953189, dated April 15, 1993. We find that the illuminated tree-shaped figurine is classifiable in heading 6913, HTSUS, as an ornamental ceramic article.

Classification in the appropriate subheading at the six digit level requires a determination of the materials used to make the accessories. The legal notes to chapter 69, HTSUS, delineate which chemical tests may be performed to determine whether an article is ceramic, porcelain, china, bone china, or earthenware for tariff purposes. When performed, these tests use a sample article which is often destroyed during testing. However, in some cases specifications and information regarding the manufacturing process may also be acceptable to determine the materials used to create the article in question. Based on the facts presented, it is Customs understanding that the article is neither porcelain or china and therefore, is classifiable under subheading 6913.90, HTSUS.

Classification in the appropriate subheading at the eight digit level depends on whether the article's creator is considered a professional sculptor for tariff purposes. A professional artist and a work of art, for tariff purposes, must meet strict parameters. To be considered a professional artist, a person must have graduated from a course at a recognized school of art, or be recognized in art circles as a professional artist by acceptance of his or her works in public exhibitions limited to the free fine arts. In addition to being considered a professional artist, each article produced by that artist must be original in design, conception, and execution.

Because of the minimal value of the article, we do not believe that the creator of the article meets the definition of a professional sculptor for tariff purposes. Therefore, the article is classifiable under subheading 6913.90.50, HTSUS, which provides for Statuettes and other ornamental ceramic articles: Other: Other: Other.

Holding:

The subject illuminated decorative article is classifiable in subheading 6913.90.50, HTSUS. The general column one rate of duty is 7 percent *ad valorem*.

DD 896697 dated May 4, 1994, is hereby revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A HUMIDIFIER WITH HEATING ELEMENT

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a humidifier. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before September 16, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a humidifier. In DD 897237, issued on May 3, 1994, by the District Director of Customs, Seattle, Washington, a humidifier incorporating a heating element, which was used to provide a warm mist of water to reduce dryness in the air, was held to be classifiable under subheading 8509.80.00, HTSUS, which provides for other electromechanical domestic appliances, with self-contained electric motor. The ruling letter is set forth in Attachment A to this document.

Customs Headquarters is of the opinion that the humidifier is classifiable under subheading 8516.79.00, HTSUS, which provides for other electrothermic appliances, and is therefore excluded from heading 8509, HTSUS, by note 3 to chapter 85.

Customs intends to modify DD 897237 to reflect the proper classification of the product in subheading 8516.79.00, HTSUS. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters ruling HQ 956741 revoking DD 897237 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 27, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Seattle, Wash., May 3, 1994.

CLA–2–85 SE:C:D B12 897237
Category: Classification
Tariff No. 8516.29.0030,
8509.80.0050 and 8513.10.2000

WARREN E. COE
AMWAY CORPORATION
7575 E. Fulton Road
Department 52–2A
Ada, Mich. 49355

Re: The tariff classification of space heater with fan, ceramic space heater with fan, humidifiers, and rechargeable lantern from China.

DEAR MR. COE:

In your letter dated April 19, 1994, you requested a classification ruling.

The merchandise consists of Model SKU No. X5684 Vendor No. Holmes HMF295 which is a space heater with fan, Model SKU No. X5685 Vendor No. Holmes HCH4060T which is a ceramic space heater with fan, Model SKU No. X5690 Vendor No. Holmes HCM9000 which is a humidifier with a heater element, Model SKU No. X5689 Vendor No. Homes HM2060 which is a four gallon humidifier, and Model SKU No. J5477 Vendor No. Dorsey 41–1031 which is a rechargeable lantern. All items are imported from China.

The applicable subheading for the two heaters with fans will be 8516.29.0030, Harmonized Tariff Schedule of the United States (HTS) which provides for electric space heating apparatus, other, portable space heaters, fan forced. The rate of duty will be 3.7 percent ad valorem.

The applicable subheading for the humidifiers will be 8509.80.0050, Harmonized Tariff Schedule of the United States (HTS), which provides for electromechanical domestic appliances, with self-contained electric motor; other appliances, humidifiers: evaporative. The duty rate will be 4.2 percent ad valorem.

The applicable subheading for the rechargeable lantern will be 8513.10.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for portable electric lamps designed to function by their own source of energy, lamps: other. The duty rate will be 6.9 percent ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

THOMAS W. HARDY,
District Director.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.

CLA–2 CO:R:C:M 956741 LTO
Category: Classification
Tariff No. 8516.79.00

MR. WARREN COE
AMWAY CORPORATION
7575 E. Fulton Road
Department 52–2A
Ada, Mich. 49355

Re: Humidifier with heating element; DD 897237 *modified;* Chapter 85, note 3; heading 8509; EN 85.16; "electrothermic".

DEAR MR. COE:

This is in reference to DD 897237, issued to you by the District Director of Customs, Seattle, Washington, on May 3, 1994, which concerned the classification of space heaters, humidifiers and a rechargeable lantern under the Harmonized Tariff Schedule of the United States (HTSUS). This is a reconsideration of the portion of DD 897237 concerning the model SKU No. X–5690 Vendor No. Holmes HCM9000 humidifier with heating element.

Facts:

The article in question is the model SKU No. X–5690 Vendor No. Holmes HCM9000 humidifier with heating element. The humidifier provides a warm mist of water to reduce dryness in the air. It includes a heating element and holds 1.5 gallons of water.

In DD 897237, the humidifier was held to be classifiable under subheading 8509.80.00, HTSUS, which provides for other electromechanical domestic appliances, with self-contained electric motor.

Issue:

Whether the humidifier with heating element is classifiable under subheading 8509.80.00, HTSUS, which provides for other electromechanical domestic appliances, with self-contained electric motor.

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states in pertinent part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the Customs Co-operation Council's official interpretation of the Harmonized System. While not legally binding, the ENs provide a commentary on the scope of each heading of the Harmonized System, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Note 3 to chapter 85, HTSUS, states that heading 8509, HTSUS, does not cover the electrothermic appliances of heading 8516, HTSUS. Moreover, EN 85.09, pg. 1346, states that heading 8509, HTSUS, does not cover "[e]lectro-thermic domestic appliances **(heading 85.16)** [emphasis in original]." Therefore, if the humidifiers are classifiable under heading 8516, HTSUS, they cannot be classified under heading 8509, HTSUS.

The term *electrothermic* is not defined in the HTSUS or the ENs. When terms are not so defined, they are construed in accordance with their common and commercial meaning. *Nippon Kogasku (USA), Inc. v. United States,* 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States,* 69 CCPA 128, 673 F.2d 1268 (1982).

The term *electrothermic* means "relating to or combining electricity and heat; **specif:** relating to the generation of heat by electricity." *Webster's Ninth New Collegiate Dictionary,* pg. 402 (1990). The humidifier in question uses electricity and heat (heating element) to convert up to 1.5 gallons of water into a warm mist to reduce dryness in the air.

Thus, the humidifier is classifiable under heading 8516, HTSUS, specifically under subheading 8516.79.00, HTSUS, which provides for other electrothermic domestic appliances.

We note that subheading 8509.80.0050, HTSUS, mentions evaporative humidifiers. With regard to the statistical suffixes in the tariff schedule, tariff-rate lines are annotated by the addition of 2-digit statistical suffixes to 8-digit subheadings merely to permit the collection of trade data on narrower classes of merchandise. *See* Committee on Ways and Means of the U.S. House of Representatives, Overview and Compilation of U.S. Trade Statutes (WMPC:101–14) 5 (1989). These statistical "break outs", are not a part of the legal text of the HTSUS, and therefore, cannot act as authority for classification under the HTSUS. *See* Section 1204 of the Omnibus Trade and Competitiveness Act of 1988 (102 Stat. 1147).

Holding:

The model SKU No. X–5690 Vendor No. Holmes HCM9000 humidifier with heating element is classifiable under subheading 8516.79.00, HTSUS, which provides for other electrothermic domestic appliances. The corresponding rate of duty for articles of this subheading is 5.3% *ad valorem*.

DD 897237, dated May 3, 1994, is modified accordingly.

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 94–120)

KEMIRA FIBRES OY, PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 94–07–00405

Kemira Fibres Oy moves, pursuant to Rule 65 (a) of the Rules of this Court, for a preliminary injunction to enjoin the United States Department of Commerce, International Trade Administration ("Commerce"), from conducting an administrative review of viscose rayon staple fiber from Finland for 1993–94. Plaintiff seeks relief pending the conclusion of this civil action which challenges Commerce's failure to revoke the antidumping duty finding with respect to *Viscose Rayon Staple Fiber From Finland,* 44 Fed. Reg. 17,156 (1979).

Held: Plaintiff has succeeded in satisfying the requisite criteria for injunctive relief. [Plaintiff's motion for a preliminary injunction is granted.]

(Dated July 26, 1994)

Arent Fox Kintner Plotkin & Kahn (James H. Hulme and *Christine L. Herrell)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis,* Assistant Director, and *Dean L. Grayson);* of counsel: *Anna Y.M. Park,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendants.

OPINION

TSOUCALAS, *Judge:* Pursuant to Rule 65(a) of the Rules of this Court, Kemira Fibres Oy ("Kemira") filed a motion requesting that this court grant a temporary restraining order ("TRO") and a preliminary injunction enjoining the Department of Commerce, International Trade Administration ("Commerce"), from conducting an administrative review of viscose rayon staple fiber ("fiber") exported from Finland by Kemira for the period 1993–94, in connection with the antidumping finding ("Finding") issued in *Viscose Rayon Staple Fiber From Finland,* 44 Fed. Reg. 17,156 (1979). Plaintiff seeks this relief pending the entry of final judgment on its request for a permanent injunction and declaratory judgment. The Court granted plaintiff's motion for a TRO on July 13, 1994, and scheduled a hearing on plaintiff's motion for a preliminary injunction. Subsequently, on July 19, 1994, a full hearing was held to determine whether a preliminary injunction should issue.

Kemira Fibres Oy is the corporate successor to Kemira Oy Sateri, the respondent in the original antidumping investigation from which an

antidumping duty order ("Order") issued. The domestic party who petitioned for the administrative review which resulted in the 1979 Finding is no longer in existence. Lenzing Fibers Corporation ("Lenzing") and Courtaulds Fiber Inc. ("Courtaulds"), two parties currently interested in maintaining the Order, and who, to facilitate that result, have petitioned Commerce for an administrative review, are new entrants to the fiber industry.

BACKGROUND

On March 21, 1979, the United States Treasury Department issued a finding of dumping with respect to the fiber. *Viscose Rayon Staple Fiber From Finland,* 44 Fed. Reg. 17,156. Kemira Oy Sateri, the only known exporter of the fiber from Finland to the United States, was the sole respondent.

Effective January 2, 1980, authority for administering the antidumping law was transferred from the Treasury Department to the United States Department of Commerce. Commerce conducted administrative reviews of the fiber until 1988. It received no requests for an administrative review during the anniversary month in 1989, 1990, 1991, and 1992 and, consequently, conducted no reviews through February, 1992.

On March 12, 1993, Commerce published a notice offering interested parties an opportunity to request an administrative review of the fiber for the period March 1, 1992, through February 28, 1993. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 58 Fed. Reg. 13,583 (1993). Commerce received no requests for an administrative review by the last day of the anniversary month in March 1993.

On June 3, 1993, Commerce published a notice of its intent to revoke the Finding on the fiber. *Rayon Staple Fiber From Finland; Intent to Revoke Antidumping Finding,* 58 Fed. Reg. 31,504. The notice stated, "if no domestic interested party objects to this intent to revoke within 30 days from June 3, 1993, [Commerce] shall conclude that the finding is no longer of interest to interested parties and shall proceed with revocation." *Id.* at 31,505.

By letter, dated June 28, 1993, Lenzing and Courtaulds, the only two U.S. domestic producers of rayon staple fiber, responding to the June 3, 1993 notice, objected to the proposed revocation.

On March 4, 1994, Commerce published a notice offering interested parties an opportunity to request an administrative review of the fiber for the period March 1, 1993, through February 28, 1994. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Ppportunity to Request Administrative Review,* 59 Fed. Reg. 10,368 (1994). In response to the March 4, 1994 notice, on March 29, 1994—within the anniversary month of the dumping Finding, Lenzing and Courtaulds requested that Commerce conduct an administrative review with respect to Kemira's imports.

On March 29, 1994, Commerce published a notice of its intent to revoke the dumping Finding and the Order on the fiber, *Intent to Revoke Antidumping Duty Orders and Findings,* 59 Fed. Reg. 14,608 (1994). In response, on April 11, 1994, Lenzing and Courtaulds objected to the proposed revocation.

For the purpose of conducting an administrative review, on April 21, 1994, Commerce sent Kemira a questionnaire; the response due date was June 6, 1994. On May 25, 1994, Kemira requested an extension of time to submit its response; the request was granted and the new response due date was June 28, 1994.

On May 12, 1994, Commerce published a notice of its intent to initiate an administrative review of the fiber for the period March 1, 1993, through February 28, 1994. *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 59 Fed. Reg. 24,683 (1994).

On June 23, 1994, Kemira protested Commerce's decision to initiate this review and, concurrently, requested another extension of time to file its questionnaire response. An extension of time was granted; the new response date was July 13, 1994.

On July 13, 1994, Kemira submitted its questionnaire response. Subsequently, also on July 13, 1994, Kemira withdrew its questionnaire response and filed a motion for a TRO and a preliminary injunction pending resolution of litigation with respect to Commerce's failure to revoke the 1979 Finding and Order on the fiber.

DISCUSSION

Kemira carries the burden of demonstrating that the Court of International Trade has jurisdiction to rule on plaintiff's claim. *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 189 (1936); *Smith Corona Group, SCM Corp. v. United States,* 8 CIT 100, 102, 593 F. Supp. 415, 417–18 (1984). Plaintiff argues that the court has jurisdiction pursuant to 28 U.S.C.§ 1581(i) (1988).[1] Kemira claims jurisdiction under subparagraphs (1), (2) and (4) of this provision. This "residual" jurisdiction provision grants exclusive jurisdiction to the Court of International Trade concerning issues relating to the antidumping duty law which are not specifically covered by other subparagraphs of section 1581. Plaintiff contends that review under other subparagraphs of section 1581 would be manifestly inadequate as participation in an administrative review will cause it irreparable harm.

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[1] Section 1581(i) states, in part, as follows:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i) (1988).

Defendant maintains that plaintiff has an adequate remedy under 28 U.S.C. §§ 1581(c) and 1516a.[2] That is, defendant contends that if plaintiff waits until the conclusion of the 1993–94 administrative review before seeking judicial review and any injunctions that may be appropriate, plaintiff may proceed under 19 U.S.C. § 1516(c)(2) to prevent the assessment of duties on entries covered by the administrative review. In the interim, defendant states that, liquidation of plaintiff's entries will be suspended.

Section 1581(i) may be invoked as a basis for subject matter jurisdiction where another subsection of § 1581 is unavailable or when the remedy provided by the other subsection would be "manifestly inadequate." *See Asociacion Colombiana de Exportadores de Flores (Asocoflores) v. United States,* 13 CIT 584, 717 F. Supp. 847 (1989), *aff'd,* 903 F.2d 1555 (Fed. Cir. 1990). *See also Miller & Co. v. United States,* 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied,* 484 U.S. 1041 (1988). In *Asocoflores,* the court found jurisdiction under § 1581(i) where plaintiff sought to enjoin Commerce from conducting an allegedly unlawful administrative review and argued that Commerce had acted in contradiction to its own regulations when it initiated the review. In that case, plaintiffs alleged hardship in expending time, effort and money to participate in the review. The court found that the remedy afforded pursuant to § 1581(c), after a final determination was manifestly inadequate because, upon conclusion of the review, plaintiffs' challenge would be moot. *Asocoflores,* 13 CIT at 586–87, 717 F. Supp. at 850. This action is similar to the one that confronted the court in the *Asocoflores* case, in that, Kemira challenges the legality of the proposed administrative review and seeks relief from the requirement of participating in a review which it deems improper according to Commerce's own regulations. Further, in this action plaintiff has objections grounded in due process. Moreover, this dispute does not concern the matter of which rates will ultimately apply to plaintiff's fiber, but rather, concerns the question of whether plaintiff must participate in a review of its fiber exports at all. Given the clear showing in this case that such a review is not appropriate, this is not an insubstantial concern.

Therefore, the Court finds that jurisdiction exists pursuant to 28 U.S.C. § 1581(i).

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[2] Pursuant to 28 U.S.C. § 1581(c), this court has jurisdiction over all actions commenced under section 516A of the Tariff Act of 1930. Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a provides, in part, as follows:

§ 1516a. Judicial review in countervailing duty and antidumping duty proceedings

* * * * * * *

(c) Liquidation of entries

* * * * * * *

(2) Injunctive relief

In the case of a determination described in paragraph (2) of subsection (a) of this section by the Secretary, the administering authority, or the Commission, the United States Court of International trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

19 U.S.C. § 1516a (1988).

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

Having determined that the court possesses jurisdiction pursuant to section 1581(i), the Court addresses plaintiff's motion for injunctive relief. In order for a preliminary injunction to issue, plaintiff must demonstrate: (1) that it has a likelihood of success on the merits; (2) that there is a threat of immediate and irreparable harm to plaintiff if relief is not granted; (3) that the balance of the hardships to the parties favors issuance of the preliminary injunction; and (4) that the public interest would be better served by a grant of the relief requested. *Zenith Radio Corp. v. United States,* 710 F.2d 806, 809 (Fed. Cir. 1983); *Timken Co. v. United States,* 11 CIT 504, 506, 666 F. Supp. 1558, 1559 (1987). "If any one of the requisite factors has not been established by plaintiff[], the motion for a preliminary injunction must be denied." *Trent Tube Div., Crucible Materials Corp. v. United States,* 14 CIT 587, 588, 744 F. Supp. 1177, 1179 (1990) *citing S.J. Stile Assocs. Ltd. v. Snyder,* 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981); *Budd Co., Wheel and Brake Div. v. United States,* 12 CIT 1020, 1022, 700 F. Supp. 35, 37 (1988).

A. *Likelihood of Success on the Merits:*

Kemira claims that, as a matter of law, Commerce is barred from proceeding with an administrative review on two grounds. First, plaintiff asserts that Commerce is without jurisdiction to proceed with a review because, as of April 1, 1993, Commerce was required to revoke the Finding on the fiber, pursuant to 19 C.F.R. § 353.25(d)(4)(i), (ii) and (iii) (1993). Second, plaintiff asserts that Lenzing's and Courtaulds' June 28, 1993 objection to the proposed revocation of the Finding was not timely as Commerce was precluded from accepting it because it was not filed or served on plaintiff as required by 19 C.F.R. § 353.31(g) (1993).

Defendant admits that, on March 12, 1993, it published a notice inviting requests for an administrative review for the period 1992–93 and that no requests ensued. Defendant contends that, due to a backlog of cases, Commerce was unable, on March 1, 1993, to publish a notice of its intent to revoke the Finding and that, consequently, it published the notice on June 3, 1993. Commerce maintains that Lenzing's and Courtaulds' June 23, 1993 objection to the proposed revocation was timely and that these interested parties subsequently timely requested an administrative review.

Defendant states that, as it had not revoked the Finding, on March 4, 1994, it invited requests for an administrative review for 1993–94. Commerce maintains that, since Lenzing and Courtaulds timely requested an administrative review in response to the March 4, 1994 notice, it properly initiated an administrative review and proceeded to conduct it pursuant to 19 U.S.C. § 1675(a) (1988) and 19 C.F.R. § 353.22(c) (1993).

Commerce argues that the regulation that plaintiff relies upon requires Commerce to proceed with revocation of the Finding only in the event that no interested party has objected to the proposed revocation. Commerce contends that, as there was objection, it was not at liberty to revoke the Finding.

Additionally, Commerce contends that Lenzing's and Courtaulds' failure to serve plaintiff with their objection to the proposed revocation of the Finding is a harmless error which did not adversely affect plaintiff.

Commerce argues that it has broad discretion in determining whether to revoke an outstanding dumping finding. Commerce relies on *Philipp Bros. v. United States*, 10 CIT 76, 630 F. Supp. 1317 (1986), and other cases for the proposition that statutory time limits on administrative acts are directory, rather than mandatory, where the statute does not specify adverse consequences for the agency's failure to meet the time limit.

The gravamen of plaintiff's argument is that Commerce's own regulation mandates revocation of the Finding.[3] Plaintiff's argument has merit.

Section 353.25(d)(4)(i) clearly requires that Commerce will publish a notice of its intent to revoke an antidumping order not later than the first day of the fifth consecutive annual anniversary month if no interested party has requested an administrative review. In the case at bar, Commerce admits that it did not publish such a notice on March 1, 1993, the relevant date when a notice was required to have been published. Further, Commerce admits that no interested party objected to revocation of the Order *or* requested an administrative review by March 31, 1993. *See* 19 C.F.R. § 353.25(d)(4)(iii) (1993). Hence, as the language in Commerce's own regulation is mandatory rather than directory, on April 1, 1993, Commerce was obliged to revoke the outstanding Order on fiber. "It is settled that '[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period *and specifies a consequence for failure to comply with the provisions'.*" *Canadian Fur Trappers Corp. v. United States*, 12 CIT 612, 615, 691 F. Supp. 364, 367 (1988), *aff'd*, 884 F.2d 563 (Fed. Cir. 1989) (quoting *Alberta Gas Chems. Inc. v. United States*, 1 CIT 312, 315–16, 515 F. Supp. 780, 785 (1981)). "Statutory deadlines are usually directory and not mandatory when 'no restraint is affirmatively imposed on the doing of the act after the time specified and no adverse consequences are imposed for the delay.'" *Canadian Fur Trappers* at 615, 691 F. Supp. at 367 (quoting *Philipp Bros.*, 10 CIT at 82, 630 F. Supp. at 1323). In this case, *the adverse consequence* of no interested party having objected *or* requested an administrative review by the last

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[3] **§ 353.25 Revocation of orders; termination of suspended investigation.**

(d) *Revocation or termination based on changed circumstances* * * *.

(4)(i) *If for four consecutive annual anniversary months* no interested party has requested an administrative review, under § 353.22(a), of an order or suspended investigation, not later than the first day of the fifth consecutive annual anniversary month, the Secretary will publish in the FEDERAL REGISTER notice of "Intent to Revoke Order" or, if appropriate, "Intent to Terminate Suspended Investigation."

(ii) Not later than the date of publication of the notice described in paragraph (d)(4)(i) of this section, the Secretary will serve written notice of the intent to revoke or terminate on each interested party listed on the Department's service list and on any other person which the Secretary has reason to believe is a producer or seller in the United States of the like product.

(iii) *If by the last day of the fifth annual anniversary month* no interested party objects, or requests an administrative review under § 353.22(a), *the Secretary at that time will conclude that the requirements of paragraph (d)(1)(i) for revocation or termination are met, revoke the order* or terminate the suspended investigation, and publish in the FEDERAL REGISTER the notice described in paragraph (d)(3)(vii) of this section.

19 C.F.R. § 353.25(d)(4) (1993) (emphasis added).

day of the fifth anniversary month *was that Commerce would revoke the Finding,* therefore, the directive of section 353.25(d)(4)(iii) is mandatory. Hence, the Secretary was obligated to revoke the Order and no administrative review should have been commenced.

Parenthetically, Lenzing's and Courtaulds' June 3, 1993 objection to the proposed revocation of the Finding was invalid because the objection ensued in response to an invitation erroneously extended as the time to issue the notice had expired and Commerce was obligated to revoke the Order.

Thus, Kemira has prevailed in showing that it has a likelihood of succeeding on the merits in its action against Commerce.

B. *Threat of Immediate Irreparable Harm:*

Kemira alleges irreparable harm based on deprivation of constitutional due process rights. Specifically, plaintiff claims that participation in an administrative review would be at the loss of substantive and procedural rights under the laws of the United States. Further, plaintiff contends that it will be irreparably injured if it is required to divulge commercial information to its competitors.

Defendant does not address whether Kemira has constitutionally protected interests, but rather, argues that the statute and regulations contain safeguards for the protection of proprietary information and there is no reason to believe such information would not be adequately protected.

With respect to Kemira's concern regarding disclosure of its sensitive commercial information, the Court notes that Commerce is dependent on the submission of complete and thorough information in order to complete its fact-finding processes. Clearly, Commerce's investigatory needs must be balanced with a party's need for confidentiality. However, this balance is achieved through proprietary information safeguards. 19 U.S.C. § 1677f(b) (1988); 19 U.S.C. § 1677f(c)(1)(A) (1988 & Supp. IV 1992); 19 U.S.C. § 1677f(c)(1)(B) (1988); 19 C.F.R. § 353.34 (1993).

Deprivation of constitutional rights constitutes irreparable harm sufficient to require immediate relief. *See, e.g., Bowman v. Township of Pennsauken,* 709 F. Supp. 1329, 1348 (D.N.J. 1989) (equal protection and due process violations establish irreparable harm). The United States Court of Appeals for the Federal Circuit has recognized that, "[t]hose seeking constitutional protection under the due process clause must point to a 'legitimate claim of entitlement' prior to any consideration of the Government's constitutional obligations." *American Ass'n of Exporters and Importers-Textile and Apparel Group v. United States,* 751 F.2d 1239, 1250 (Fed. Cir. 1985) (citing *Arnett v. Kennedy,* 416 U.S. 134, 167 (1974). *See also, Board of Repents v. Roth,* 408 U.S. 564, 577 (1972) (where a person has a legitimate claim of entitlement to a benefit, that person is entitled to procedural due process). Further, in order to be protected, an interest must be more than a "unilateral expectation." *Id.* 408 U.S. at 570. Entitlements are created by rules or understandings of law, the substance of which, the public is free to peruse and has a right to

rely upon. Though Kemira does not articulate its due process argument with specificity, it is clear that 19 C.F.R. § 353.25(d)(4)(iii) secured, for Kemira, the benefit of revocation of the Order. The Court has reviewed the substance of this regulation and has found that its language clearly supports Kemira's claim of entitlement to that benefit. Nonetheless, Commerce seeks to deny Kemira this entitlement by drawing it into an administrative review.

It is well settled that procedural due process guarantees do not require full-blown, trial-type proceedings in all administrative determinations. *See, e.g., Mathews v. Eldridge,* 424 U.S. 319, 348 (1976). In *Pasco Terminals, Inc. v. United States,* 83 Cust. Ct. 65, 477 F. Supp. 201 (1979), *aff'd,* 68 CCPA 8, C.A.D. 1256, 634 F.2d 610 (1980), the court found that "when administrative agencies conduct nonadjudicative fact-finding investigations, rights such as cross-examination generally do not obtain." *Pasco Terminals,* 83 Cust. Ct. at 78, 477 F. Supp. at 213 *(citing Hannah v. Larche,* 363 U.S. 420, 445–46 (1960)). The United States Customs Court in *Pasco* stated:

> [D]ue process does not necessarily require a trial-type hearing or an opportunity to confront and cross-examine witnesses. The fact is that the differences in the origin and function of administrative agencies preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.

Pasco Terminals, id. at 78,477 F. Supp. at 213. Nonetheless, agencies must adhere to the procedures Congress has mandated, lest actions be deemed arbitrary, capricious and not in accordance with law. *Cf. Union of Concerned Scientists v. Atomic Energy Comm'n,* 499 F.2d 1069, 1082 (D.C. Cir. 1974) (an agency's failure to follow its own rules and procedures is fatal to an action). Though administrative agencies require a measure of latitude in performing their Congressionally mandated functions, judicial review of administrative determinations can only be meaningful under the due process clause of the Fifth Amendment if the reviews have been initiated in compliance with the procedures which Congress has set forth in statutes and which Commerce has implemented in its regulations. In the case at bar, Commerce's regulation 19 C.F.R. § 353.25(d)(4)(iii) specifically sets forth that on the first day of the fifth anniversary month, in this case March 1, 1993, Commerce shall publish a notice notifying interested parties of its intention to revoke the Finding and inviting them to file any objections that they may have. Commerce failed to do this. Instead, on March 12, 1993, it published a notice inviting interested parties to request an administrative review. Commerce received no requests for a review by the last day of the fifth anniversary month. Belatedly—on June 3, 1993, Commerce published a notice of its intent to revoke the Finding. Although the domestic industry did file an objection to the revocation within thirty days of the notice's publication, no administrative review was requested. Thereafter, on March 4, 1994, one year later—in the sixth anniversary month,

Commerce issued a notice offering interested parties an opportunity to request an administrative review and issued a notice of its intent to revoke the Finding and the Order. It is clear that Commerce did not comply with the procedures set forth in its own regulations and failed to implement same. In so doing, Commerce acted in an arbitrary and capricious manner and deprived Kemira of its constitutional due process right.

Hence, although the Court agrees with Commerce that the statute and regulations provide adequate protection for Kemira's sensitive commercial information, the Court finds that Kemira prevails on this issue on due process grounds.

C. *Balance of the Hardship:*

In balancing the hardships on the parties, there is no doubt that the scale tips decidedly in plaintiff's favor. Kemira's clear right to relief is not counterbalanced by any showing of injury or loss to Commerce, whose remedies remain intact. Upon a new petition from an interested domestic party for a new antidumping investigation, Commerce can determine whether the fiber is being sold in the United States at less than its fair value. Moreover, the International Trade Commission may determine whether the U.S. domestic fiber industry is being injured as a consequence of fiber imports. Upon a determination that fiber imports are entering the country at less than fair value and that there is injury to the domestic fiber industry, a new antidumping duty order may issue.

D. *Service of the Public Interest:*

"The public interest is served when agencies act in conformity with a statutory mandate designed to achieve goals inuring to the public benefit." *Hyundai Pipe Co. v. U.S. Int'l Trade Comm'n,* 10 CIT 695, 699–700, 650 F. Supp. 174, 177 (1986). Moreover, it would be unfair to the foreign producer to subject it to an administrative review instead of to a new investigation when the two domestic manufacturers interested in maintaining the Order, were not in the fiber industry when the Order was initially issued. In point of fact, there is no way to know whether these domestic producers are being injured by Kemira's imports.

Therefore, the public interest is served by a grant of the relief requested.

Conclusion

Plaintiff has satisfied the requirements for injunctive relief. Accordingly, this Court grants Kemira's motion for a preliminary injunction and hereby enjoins Commerce from conducting an administrative review of viscose rayon staple fiber from Finland for 1993–94.

Because this decision also disposes of the merits of this action, a declaratory judgment will issue unless facts contradicting or explaining the facts in this decision are submitted within 10 days of the date this opinion is entered. If such information is not submitted by the parties, the Court will deem that it has all of the facts on this case and it will issue a declaratory judgment.

(Slip Op. 94–121)

H.J. STOTTER, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–03–00142

Plaintiff moves for summary judgment, challenging Customs' classification of certain wicker articles under item 222.42, TSUS, and claiming the merchandise is properly classifiable under item 222.60, TSUS. Defendant cross-moves for summary judgment, contending Customs' classification under item 222.42, TSUS, is correct.

The Court holds (1) plaintiff has overcome the presumption of correctness and (2) the ice bucket with lid (Style No. 10335R), pitcher with lid (Style No. 10334R), tray with strengthened sides (Style No. 10333), set of six jumbo coasters (Style No. 10332), and set of six DOF coasters (Style No. 10331) are properly classified under item 222.60, TSUS.

(Dated July 27, 1994)

Fitch, King & Caffentzis (Peter J. Fitch), for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Edith Sanchez Shea); Steven Berke,* Office of the Assistant Chief Counsel, United States Customs Service, of Counsel, for defendant.

OPINION

CARMAN, *Judge:* Plaintiff commenced this action pursuant to 19 U.S.C. § 1515(a) (1988) to challenge the United States Customs Service's (Customs) classification and liquidation of its imported merchandise. The Court has jurisdiction under 28 U.S.C. § 1581(a) (1988) and, for the reasons which follow, enters judgment for plaintiff.

BACKGROUND

The merchandise at issue consists of the following white wicker articles: an ice bucket with lid (Style No. 10335R), a pitcher with lid (Style No. 10334R), a tray with strengthened sides (Style No. 10333), a set of six jumbo coasters (Style No. 10332), and a set of six DOF coasters (Style No. 10331). Plaintiff's Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried (Pl. Stmt.) at ¶ 1. For purposes of the tariff schedules, all of the subject merchandise are "of rattan." *Id.* at ¶ 3. The only evidence Customs has concerning the use of the imported merchandise is information provided in Plaintiff's Exhibit (Pl. Ex.) 2. *Id.* at ¶¶ 8, 9. This evidence indicates the two types of coasters (Style Nos. 10331 and 10332) are used as glass or tumbler holders. *Id.* at ¶ 8. Plaintiff's Exhibit 2 provides photographs of each of the items as contained in plaintiff's sales catalog. These photos show that a plastic ice bucket, pitcher and tumbler fits within the respective wicker items. Pl. Ex. 2. The plastic inserts are removable for purposes of cleaning. *Id.*

Customs classified all of the merchandise in three of the entries, and the ice buckets (Style No. 10335) and pitchers (Style No. 10334) in the fourth entry, under item 222.42, TSUS. In the fourth entry (No. 241–1018160), however, Customs classified the coasters/glass holders (Style Nos. 10331 and 10332) and the trays (Style No. 10333) under item

222.60, TSUS. Pl. Stmt. at ¶ 7. The parties agree the trays (Style No. 10333) are properly classified under item 222.60, TSUS. *Id.* at ¶¶ 4, 6. Additionally, it is not disputed that the trays "are articles of the type described in the [Tariff Classification Study Explanatory and Background Materials, Schedule 2, Part 2 (1960) *(TCS)]* as being classifiable under Tariff Items 222.60 through 222.64." *Id.* at ¶ 5. Item 222.42, TSUS provides for an *ad valorem* rate of 10%, while item 222.60, TSUS provides for an *ad valorem* rate of 6.6%.

Plaintiff filed a timely protest under 19 U.S.C. § 1514(a) (1988) to challenge Customs' classification. On February 28, 1992, Customs denied the protest under 19 U.S.C. § 1515 and, after having paid all liquidated duties, plaintiff commenced this action pursuant to 28 U.S.C. § 1581(a).

TARIFF PROVISIONS

Classified under:

Schedule 2, Part 2, Subpart B (1986):
Baskets and bags, of unspun fibrous vegetable materials, whether lined or not lined:

* * * * * * *

222.42 Of rattan or of palm leaf * * * 10% * * *.

Claimed under:

Schedule 2, Part 2, Subpart B (1986):
Articles not specially provided for, of unspun fibrous vegetable materials:

222.60 Of one or more of the materials bamboo, rattan, willow, or chip * * * 6.6% * * *.

CONTENTIONS OF THE PARTIES

Plaintiff contends the merchandise at issue should properly be classified under item 222.60, TSUS. In support of its argument, plaintiff relies primarily on the legislative intent as indicated by the *TCS*. Plaintiff argues the *TCS* demonstrates the subject imports should be classified under item 222.60, TSUS, and that this legislative intent "should outweigh any argument based purely upon physical descriptions of what might or might not be considered * * * a basket." Pl. Memo in Support of Motion for Summary Judgment (Pl. Memo) at 7.

Additionally, plaintiff claims the Court should not presume Customs' classification of the two types of coasters/glass holders (Style Nos. 10331 and 10332) under item 222.42, TSUS, is correct because Customs classified some of the coaster entries under item, 222.60. According to plaintiff, Customs loses its presumption of correctness where it classifies identical merchandise under two different tariff provisions. Moreover, plaintiff points out Customs has presented no evidence which indicates the classification of the coasters/glass holders (Style Nos. 10331 and 10332) under item 222.60, TSUS, in entry number 241–10181660 was simply a mistake.

Defendant cross-moves for summary judgment requesting that the Court deny plaintiff's motion for summary judgment except with respect to the trays (Style No. 10333). Defendant agrees with plaintiff that the trays are properly classified under item 222.60, TSUS. With respect to the other merchandise, however, Customs contends its classification is correct because the subject imports fit within the provision for "rattan baskets" in item 222.42, TSUS. Customs maintains the conflicting classifications of the coasters/glass holders (Style Nos. 10331 and 10332) do not preclude the presumption of correctness from attaching to its decision because the classification of these items under item 222.60, TSUS, was an error.

Customs further argues plaintiff has not properly interpreted the TSUS. Customs points to the language of TSUS General Rule of Interpretation 10(c) which indicates merchandise must be classified based on "the provision which most specifically describes it." According to defendant, the provision for "rattan baskets" in item 222.42, TSUS, is more specific than the general provision for rattan articles not specifically provided for in item 222.60, TSUS. Because a more specific *eo nomine* provision is preferred to classification under "not specifically provided for" provisions, defendant concludes the merchandise in question must be classified under item 222.42, TSUS. Defendant discounts plaintiff's reliance on the *TCS* arguing this "only includes items which are not included in the common meaning of baskets." Def. Reply at 2. Defendant maintains "because the articles here *are* included in the common meaning of baskets, * * * they are properly classifiable as baskets." *Id.*

Standard of Review

As with all customs classification cases, the government's classification decision is presumed to be correct and the party challenging the decision has the burden of overcoming this statutory presumption. 28 U.S.C. § 2639(a)(1) (1988). To determine whether an importer has overcome the statutory presumption, the Court "must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States,* 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984).

Discussion

This case is before the Court on cross-motions for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(d). "The Court will deny summary judgment if the parties present a dispute about a fact such that a reasonable trier of fact could return a verdict against the movant." *Ugg Int'l v. United States,* 17 CIT ____, ____, 813 F. Supp. 848, 852 (1993) (quotation and citation omitted). This case does not present any genuine issue of material fact. The issue that remains is whether the rattan articles before the Court

are rattan baskets as classified by Customs, or, articles not specially provided for of rattan, as claimed by plaintiff. Because this issue pertains solely to matters of statutory interpretation, specifically the proper meaning of the tariff provisions advanced by the parties, the Court concludes the parties' conflict raises a question of law which the Court may properly resolve by summary judgment. *Digital Equip. Corp. v. United States*, 8 Fed. Cir. (T) 5, 6, 889 F.2d 267, 268 (1989) (citation omitted).

Although Customs' decisions enjoy a presumption of correctness,[1] the Court's role in reviewing Customs cases *de novo* is to find the *correct* result. *See Semperit Indus. Prods., Inc. v. United States*, 18 CIT ____, ____, Slip Op. 94–100 at 15–18 (June 14, 1994). The Court determines the correct result in customs classification cases in order to achieve fair results and provide "uniform and consistent interpretation and application of the customs laws[.]" *Jarvis Clark*, 2 Fed. Cir. (T) at 73, 733 F.2d at 876 (quotations and citation omitted).

In the instant action the presumption of correctness does not attach to all of Customs' classifications of the subject imports. Because Customs classified identical merchandise under two different categories, there are conflicting conclusions of the proper classification before the Court. Although Customs maintains in its papers that the classification of the coaster/tumbler holders (Style Nos. 10331 and 10332) under item 222.60, TSUS, was simply an error, Customs provided the Court with no evidence to that effect. Consequently, plaintiff need not overcome the presumption of correctness with respect to the coaster/tumbler holders (Style Nos. 10331 and 10332), but will need to overcome the presumption of correctness attached to Customs' classification of the ice bucket with lid (Style No. 10335R) and pitcher with lid (Style No. 10334R).[2]

The provision for baskets is an *eo nomine* designation, a designation "which describes a commodity by a specific name, usually one well known to commerce." RUTH F. STURM, CUSTOMS LAW AND ADMINISTRATION, § 53.2, at 3 (3d ed. 1991) (citing *United States v. Bruckmann*, 65 CCPA 90, C.A.D. 1211, 582 F.2d 622 (1978)). Although the provision for baskets is an *eo nomine* provision, to unduly focus on the *eo nomine* status of the provision serves only "to obfuscate the real issue." *United States v. Quon Quon Co.*, 46 CCPA 70, 73, C.A.D. 699 (1959). The court in *Quon Quon* noted that rather than emphasizing the *eo nomine* status of the provision, the focus should be "simply whether the imported articles are in fact 'baskets.'" *Id.* The court added that "[r]easoning from old cases involving *different* articles tends more to obscure the issue than to answer it." *Id.* (emphasis in original). *Quon Quon* arose from Customs' classification of table tops as baskets. The court held the table tops were parts of furniture and were, therefore, properly classified under the appropriate provision covering parts of furniture. *Id.* at 74. *Quon Quon*

[1] 28 U.S.C. § 2639(a)(1).

[2] Even if Customs had not presented conflicting classifications of the coasters/tumbler holders, the final result in this case would remain the same. This is true because the Court would have found plaintiff overcame the presumption of correctness for the same reason the Court holds plaintiff has overcome the presumption with respect to the ice bucket and pitcher.

provided the following additional guidance which this Court finds instructive:

> Of all things most likely to help in the determination of the identity of a manufactured article, beyond the appearance factors of size, shape, construction and the like, use is of paramount importance. To hold otherwise would logically require the trial court to rule out evidence of what things actually are every time the collector thinks an article, as he sees it, is specifically named in the tariff act.

Id. at 73. The Court, therefore, will examine both the appearance and the use of the items in question.

The question of whether the merchandise in the instant action should be properly classified as "baskets" also turns in part on the definition of "basket." The Court of Customs Appeals defined basket as "a vessel of varying capacity, made of flexible materials such as osiers, cane, twigs, and rushes, commonly interwoven and bound at the top, used for the purpose of holding, protecting, or carrying any commodity." *United States v. Byrnes & Co.*, 11 Ct. Cust. App. 68, 69, T.D. 38,728 (1921). Several subsequent cases dealing with the issue of whether a given object should be properly classified for customs purposes as a basket have relied in varying degrees on this definition. *See, e.g., Quon Quon Co. v. United States,* 48 Cust. Ct. 440, 441(1962) (holding serving trays are not baskets because "[t]hey are not 'vessels' in the sense that baskets are vessels" and that "it did not think anyone in ordinary speech would call a serving tray a 'basket'"); *International Artware Corp. v. United States,* 65 Cust. Ct. 604, 614–16, C.D. 4146 (1970) (holding hollow/concave in shape, rattan items which hold flowers, fruit and/or food were properly classified as baskets).

Another case in which the *Byrnes* definition appears is *Royal Cathay Trading Co. v. United States,* 45 Cust. Ct. 99,101, C.D. 2206 (1960). In *Royal Cathay,* the court stated "it [was] not [its] understanding that the description [of basket in *Byrnes]* has been, or was meant to be, applied in a strictly literal fashion." *Royal Cathay,* 45 Cust. Ct. at 101. The court held that although rattan suitcases and valises could conceivably come within the literal meaning of basket as defined in *Byrnes,* they were not properly classified as such because "nobody considers suitcases or valises to be a variety or kind of baskets." *Id.* The court further noted the "articles [are] so dissimilar from baskets in character that the latter term is inappropriate in referring to them, even when they are made in part of interwoven basket materials." *Id.*

This Court agrees with *Royal Cathay* that the *Byrnes* definition of basket should not be interpreted literally. The various wicker items at issue in the instant action could technically come within the generally accepted definition of baskets because they are "vessels of varying capacity, made of flexible materials such as * * * cane, * * * commonly interwoven and bound at the top, used for the purpose of holding, protecting, or carrying any commodity." *See Byrnes,* 11 Ct. Cust. App. at 69. The Court, however, finds just as "nobody considers suitcases or valises

to be a variety or kind of baskets[,]" one would not consider the type of wicker entertainment furnishings at issue to be a type of basket. *See Royal Cathay,* 45 Cust. Ct. at 101. The various wicker items in this case "are articles so dissimilar from baskets in character that the latter term is inappropriate in referring to them, even when they are made * * * of interwoven basket materials." *See id.* The Court finds, therefore, plaintiff has overcome the presumption of correctness with respect to the ice bucket with lid (Style No. 10335R) and the pitcher with lid (Style No. 10334 R).

The Court turns next to determining the proper classification of the imported merchandise. In determining the proper classification of the subject imports, it is necessary for the Court to consider not only the accepted definition of basket, but also to discern whether Congress sought to exclude any items which might otherwise fit within the accepted definition of basket from being classified as such. The Court of Customs and Patent Appeals stated,

> [t]he clear weight of the authorities on the subject is that an *eo nomine* statutory designation of an article, *without limitations or a shown contrary legislative intent,* judicial decision, or administrative practice to the contrary, and without proof of commercial designation, will include all forms of said article.

Nootka Packing v. United States, 22 CCPA 464, 470, T.D. 47464 (1935) (emphasis added); *see also Lynteq, Inc. v. United States,* 10 Fed. Cir. (T) ____, ____, 976 F.2d 693, 697 (1992) ("Tariff terms contained in the statutory language 'are to be construed in accordance with their common and popular meaning, *in the absence of contrary legislative intent.'")* (citation omitted) (emphasis added).

It appears in this case there is legislative intent as indicated by the *TCS* showing the merchandise at issue in the instant action should be excluded from being classified as baskets:

> Articles not specially provided for, of unspun fibrous vegetable materials (covered by the proposed provisions of items 222.60, 222.62, and 222.64), consist of a wide variety of products for utility, recreation, *entertainment,* and house decoration and furnishings. There are articles *such* as garden rakes, bird cages, *trays, coasters,* doilies, mats, *tumbler holders, bottle covers and other tableware,* dryers, hangers, and stretchers, fly swatters, carpet beaters, handles, stakes, back rests, *wickered bottles,* and trellises.

TCS at 53. The *TCS* is a report based on "a comprehensive study of the laws prescribing the tariff status of imported articles" which Congress directed the Tariff Commission to conduct. Tariff Classification Study Submitting Report, Part 1 at 1 (1960). The Tariff Commission submitted the *TCS* to Congress as part of the revision and consolidation of the tariff laws which Congress directed it by law to complete. *Id.* The subject imports appear to fit squarely within the cited language of the *TCS.* This indicates it was Congress' intention to exclude entertainment furnishings "such as * * * [the] coasters, * * * tumbler holders, * * * and other tableware" at issue in this action from being classified as

baskets under item 222.42, TSUS. Consequently, the Court holds the subject imports are properly classified under item 222.60, TSUS. *See United States v. General Elec. Co.*, 58 CCPA 152, 156, C.A.D. 1021, 441F.2d 1186,1189 (1971) ("[A] seemingly broad descriptive tariff term is not to be taken as encompassing every article which may literally come within that term but rather *only those articles of the type intended by Congress in enacting the TSUS.")* (emphasis added).

CONCLUSION

After considering all of plaintiff's and defendant's arguments, the Court holds plaintiff has overcome the presumption of correctness attached to Customs' classification of the ice bucket with lid (Style No. 10335R) and pitcher with lid (Style No. 10334R). Additionally, based on the physical characteristics and use of all the subject imports, as well as the legislative intent as expressed in the TCS, this Court further holds the ice bucket with lid (Style No. 10335R), pitcher with lid (Style No. 10334R), set of six jumbo coasters (Style No. 10332), and set of six DOF coasters (Style No. 10331) are properly classified under item 222.60, TSUS. Accordingly, Customs shall reliquidate this merchandise, and the trays (Style No. 10333) which Customs conceded it improperly classified, under item 222.60, TSUS.

(Slip Op. 94–122)

SUGIYAMA CHAIN CO., LTD., I&OC OF JAPAN CO., LTD., AND HKK CHAIN CORP OF AMERICA, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 92–12–00798

The Department of Commerce's *Roller Chain, Other Than Bicycle, From Japan*, 57 Fed. Reg. 56,319 (Dep't Comm. 1992) (final results), as amended by *Roller Chain, Other Than Bicycle, From Japan*, 57 Fed. Reg. 58,285 (Dep't Comm. 1992) (final results), is sustained in part and remanded in part.

The Court holds Commerce properly (1) rejected Sugiyama's March 20, 1992 submission as untimely; (2) used Hokoku's sales in its calculation of foreign market value; (3) determined it was not required to provide Sugiyama with complete computer printouts of all its calculations; and (4) determined Sugiyama and Company E are related parties within the meaning of 19 U.S.C. § 1677(13)(C) (1988).

On remand, Commerce is directed to (1) reexamine its selection of best information available for unmatched transactions; (2) eliminate the computer programming errors which resulted in differences in merchandise adjustments with respect to sales of identical models; and (3) address whether a comparison of sales to I&OC with sales by Companies E and H to their respective customers merits a level of trade adjustment.

(Dated July 27, 1994)

Arent Fox Kintner Plotkin & Kahn (Patrick F. O'Leary and *Peter L. Sultan)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice *(Michael S. Kane), Patrick V. Gallagher, Jr.,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for defendant.

OPINION

CARMAN, *Judge:* Plaintiffs move for judgment upon the agency record pursuant to Rule 56.2 of this Court. Plaintiffs contest the Department of Commerce's final results in *Roller Chain, Other Than Bicycle, From Japan,* 57 Fed. Reg. 56,319 (Dep't Comm. 1992) (final results) *(Final Results),* as amended by Roller *Chain, Other Than Bicycle, From Japan,* 57 Fed. Reg. 58,285 (Dep't Comm. 1992) (final results) *(Amendment).* The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (1988).

BACKGROUND

Commerce's original dumping finding has been in effect since April 12, 1973. *Roller Chain, Other Than Bicycle, From Japan,* 38 Fed. Reg. 9226 (1973). In response to a request from the American Chain Association, Commerce initiated the review in the instant action on May 21,1991 and published its preliminary results on February 20,1992. *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 56 Fed. Reg. 23,271 (Dep't Comm. 1991); *Roller Chain, Other Than Bicycle, From Japan,* 57 Fed. Reg. 6097 (Dep't Comm. 1992) (prelim. results) *(Preliminary Results).* The product at issue is "chain, with or without attachments, whether or not plated or coated, and whether or not manufactured to American or British standards, which is used for power transmission and/or conveyance." *Preliminary Results,* 57 Fed. Reg. at 6097. The period of review is from April 1, 1990 through March 31, 1991. *Id.*

Commerce investigated Sugiyama Chain, a manufacturer/exporter of roller chain, and two of Sugiyama's distribution channels (plaintiffs or Sugiyama). *Id.* One distributor, I&OC, is an unrelated trading company which sold to unrelated U.S. importers. The second distributor, Hokoku Chain Sales Co., Ltd. (Hokoku), is related to Sugiyama and sold Sugiyama's products through three distribution channels. Commerce determined the three channels, Hokoku, [ ] (Company H) and [ ] (Company E), are related distributors. *Final Results,* 57 Fed. Reg. at 56,320. After analyzing the information before it pertaining to Sugiyama, its two distributors and their respective distribution channels, Commerce determined the following weighted-average margins: Sugiyama/Hokoku 0.38%, Sugiyama/I&OC 5.83%, and Sugiyama/Harima Enterprises/San Fernando (Japan) 0.00%. *Id.* at 56,321; *Amendment,* 57 Fed. Reg. at 58,285.

CONTENTIONS OF THE PARTIES

Plaintiffs argue a remand is necessary in the instant action to correct various errors Commerce made in its *Final Results.* Plaintiffs claim Commerce erred in failing to grant them a level of trade adjustment. According to Sugiyama, such an adjustment is necessary because Companies E's and H's customers and I&OC are at different levels of trade. Secondly, plaintiffs argue Commerce should have based foreign market

value (FMV) wherever possible on Sugiyama's sales to Companies E and H rather than Hokoku's sales.

Plaintiffs also complain Commerce failed to provide Sugiyama with adequate information in order for Sugiyama to reproduce Commerce's calculations. Because it was unable to reproduce the calculations, Sugiyama claims it cannot determine whether Commerce committed any errors in its calculations. Additionally, plaintiffs contend Commerce erroneously determined Sugiyama and Company E are related parties. Nevertheless, because Sugiyama already raised arguments with respect to these two issues in its brief in *Sugiyama I*, plaintiff is willing to defer to the Court's decision in that case. *Sugiyama Chain Co. v. United States*, 18 CIT ____, Slip Op. 94–78 (May 12, 1994) *(Sugiyama I)*.

Commerce maintains no level of trade adjustment is required because Sugiyama failed to establish differences in levels of trade existed and to quantify its level of trade claim. Furthermore, as Sugiyama is unable to demonstrate prices to Companies E and H are comparable to prices to unrelated parties, Commerce argues it is inappropriate to base FMV on Sugiyama's sales to Companies E and H. Moreover, Commerce claims [ ], in and of itself, does not justify the use of Hokoku's sales in deriving FMV for purchase price comparisons. Finally, Commerce maintains it properly determined Company E and Sugiyama are related parties and denies any legal obligation to provide Sugiyama with a complete set of computer printouts showing all of Commerce's calculations.

Commerce agrees with plaintiffs on two issues and requests a remand to do the following: (1) reexamine its selection of best information available for unmatched transactions and (2) eliminate the computer programming errors which resulted in differences in merchandise adjustments with respect to sales of identical models.

Standard of Review

In an action challenging Commerce's final results, this Court must decide whether Commerce's determination is supported by substantial evidence on the record and is otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted).

The Court must accord substantial weight to the agency's interpretation of the statute it administers. *American Lamb Co. v. United States*, 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001(1986) (citations omitted). "An agency's 'interpretation of the statute need not be the only reasonable interpretation or the one which the court views as the most reasonable.'" *ICC Indus., Inc. v. United States*, 5 Fed. Cir. (T) 78, 85, 812 F.2d 694, 699 (1987) (emphasis in original) (citation omitted).

DISCUSSION

A. *Use of Hokoku Sales in FMV Computation:*

Plaintiffs contend Commerce should have based FMV wherever possible on Sugiyama's sales to Companies E and H rather than Hokoku's sales. Plaintiffs claim Commerce should not have used Hokoku sales as a basis for comparison with Sugiyama's sales to I&OC because [ ]. According to Sugiyama, the [ ]. Because Commerce ignored this difference, plaintiffs argue, it failed to comply with 19 U.S.C. § 1677b(a)(1) (1988)'s requirement to use "such or similar" merchandise. Plaintiffs thus request the Court remand this issue to Commerce with directions to recompute the dumping margins for certain of the sales transactions. If, however, the Court does not agree Hokoku sales should be removed from the FMV database used in comparison with I&OC sales, then plaintiffs ask the Court to require Commerce to include the Hokoku sales in the level of trade adjustment on remand.

Defendant maintains it properly calculated FMV based on Hokoku's sales. According to defendant, the express language of 19 U.S.C. § 1677(16)(A) requires Commerce, when possible, to compare merchandise with identical physical characteristics regardless of nonphysical differences. Commerce, therefore, claims [ ] is not a basis for disregarding physically identical merchandise. Moreover, defendant contends there is no record evidence supporting plaintiffs' assertion the [ ].

Commerce is required to determine in an annual administrative review "the foreign market value and United States price of each entry of merchandise subject to the antidumping order." 19 U.S.C. § 1675(a)(2)(A) (1988). In calculating FMV, Commerce must initially assess the price at which "such or similar merchandise" is first sold within the U.S. and then make any necessary adjustments to that price. 19 U.S.C. § 1677b(a)(1) (1988). Congress has defined "such or similar merchandise" as merchandise which fits one of three statutory categories. 19 U.S.C. § 1677(16) (1988). The appropriate category in this case defines "such or similar merchandise" as "[t]he merchandise which is the subject of an investigation and other merchandise which is *identical in physical characteristics* with, and was produced in the same country by the same person as, that merchandise." 19 U.S.C. § 1677(16)(A) (emphasis added).

Following the above statutory scheme, Commerce calculated FMV based on Hokoku's sales of "merchandise which is identical in physical characteristics with" the merchandise subject to the antidumping order. Although plaintiffs claim Commerce should not have based its FMV calculation on Hokoku's sales, they fail to cite any statute or case in support of their position that Commerce is precluded from using otherwise identical merchandise because of [ ]. The Court, therefore, holds Commerce properly applied 19 U.S.C. § 1677(16) in its calculation of FMV and denies plaintiffs' motion with respect to this

issue. *See Monsanto Co. v. United States,* 12 CIT 937, 939, 698 F. Supp. 275, 278 (1988) ("Plaintiff has presented no credible argument that the literal words of [§ 1677(16)] should be read in any other way than that suggested by ITA.").

B. *Level of Trade Adjustment:*

Plaintiffs argue Commerce erred in refusing to make a level of trade adjustment. According to Sugiyama, a level of trade adjustment is required because sales to Companies E's and H's customers are one level further down the distribution chain than sales to I&OC. Sugiyama argues, therefore, an adjustment is necessary to account for the marketing, sales, distribution and collection expenses incurred by Companies E and H. Plaintiffs complain Commerce confused plaintiffs' argument pertaining to the level of trade issue in the *Final Results.* Additionally, Sugiyama contends Commerce failed to address plaintiffs' proposal for quantifying the level of trade adjustment. Plaintiffs proposed using the difference in the prices at which Companies E and H bought merchandise from Sugiyama and the prices at which they sold the merchandise to their customers.

Defendant maintains it reasonably determined a level of trade adjustment is inappropriate. Defendant contends Sugiyama failed to establish indirect selling expenses incurred by related parties merit a level of trade adjustment and to quantify its level of trade adjustment request. Moreover, defendant claims selling expenses incurred by related parties are as a matter of law inadequate evidence for a level of trade adjustment. With respect to plaintiffs' post-preliminary results submission, Commerce argues it was not required to consider new factual information untimely submitted. Finally, Commerce counters plaintiffs' claim that it confused their argument regarding the proper level of trade comparison. According to Commerce, it properly considered and rejected the level of trade request and merely presented a "garbled characterization" of plaintiffs' argument in the *Final Results.*

Congress authorized Commerce to make certain adjustments when comparing U.S. price and FMV in order to calculate dumping margins most accurately. 19 U.S.C. § 1677b(a)(4) (1988). Commerce's policy, as stated in its regulations, provides the following concerning level of trade adjustments in FMV calculations:

> The Secretary normally will calculate foreign market value and United States price based on sales *at the same commercial level of trade.* If sales at the same commercial level of trade are insufficient in number to permit an adequate comparison, the Secretary will calculate foreign market value based on sales of such or similar merchandise at the most comparable commercial level of trade as sales of the merchandise and *make appropriate adjustments for differences affecting price comparability.*

19 C.F.R. § 353.58 (1992). According to its regulation, therefore, Commerce will assess whether the information used is "at the same commer-

cial level of trade," and if it is not, then the agency will "make appropriate adjustments for differences affecting price comparability."

A review of the *Final Results* indicates Commerce misunderstood plaintiffs' position. Plaintiffs argued below that a level of trade adjustment is necessary "because the sales from [Companies E and H] to their customers are at a different point in the distribution channel or, in other words, a different level of trade, than the Sugiyama prices to I&OC." R. Doc. 8 at 7. Commerce attempted to respond to this argument in the *Final Results* by stating Sugiyama failed "to demonstrate that I&OC's customers are at a different level of trade than those of companies 'E' and 'H.'" *Final Results,* 57 Fed. Reg. at 56,321. In Commerce's apparent rejection of Sugiyama's argument, the agency concluded "[o]ther than Sugiyama's unsupported claim that the customers of companies 'E' and 'H' and the customers of I&OC are at different levels of trade, [Commerce has] received no information to support a conclusion that different trade levels exist in this situation." *Id.* It is evident from Commerce's response that it believed plaintiffs were arguing I&OC's customers and Companies E's and H's customers are at different trade levels. Plaintiffs, however, argued I&OC *itself* and Companies E's and H's customers are at different trade levels. It is incumbent upon Commerce to provide an adequate rationale for its conclusions in the *Final Results.* The Court will not accept the *post hoc* rationale offered by Commerce that despite fully understanding and rejecting plaintiffs' argument, it provided a "garbled characterization" of that argument in the *Final Results.* Consequently, the Court remands this issue to Commerce with directions to consider plaintiffs' argument that they are entitled to a level of trade adjustment because Companies E's and H's customers and I&OC are at different commercial levels of trade.

Additionally, defendant's reliance on *Silver Reed* with respect to the level of trade adjustment issue is misplaced. *See Silver Reed Am., Inc. v. United States,* 13 CIT 286, 711 F. Supp. 627 (1989). *Silver Reed* did not state related party selling expenses may never be used to establish a level of trade adjustment. Based on the record before it, the Court in *Silver Reed* stated Commerce properly determined plaintiff had "complete discretion as to where to place any of its sales functions and where to account for expenses without affecting total corporate profit." *Id.* at 288–89, 711 F. Supp. at 629. Commerce made no such determination in the instant action. Rather than speculate on whether Commerce considered the precise relationship between Sugiyama and the related parties, Companies E and H, and rejected the argument based on a rationale presented in defendant's brief, the Court remands this issue to Commerce. On remand, Commerce is directed to address whether a comparison of sales to I&OC with sales by Companies E and H to their respective customers merits a level of trade adjustment.

Commerce also rejected plaintiffs' level of trade adjustment request based on "Sugiyama['s failure] to adequately quantify its claimed adjustment." *Final Results,* 57 Fed. Reg. at 56,321. Although defendant

argues in its brief that selling, marketing, distribution and collection expenses of a related party cannot serve to quantify a level of trade adjustment, Commerce did not use that rationale in the *Final Results.* Because this Court holds Commerce misunderstood plaintiffs' argument below, Commerce must address the quantification issue on remand as it pertains to a comparison of Companies E's and H's customers and I&OC. The Court, therefore, need not address the quantification issue at this time.

The final question regarding the level of trade adjustment issue is whether Commerce properly rejected the data submitted in plaintiffs' March 20, 1992 Case Brief. Sugiyama argues Commerce should have accepted the data because it merely clarifies information already on the record. Defendant, on the other hand, maintains it was not required to accept factual submissions after publication of the *Preliminary Results.*

Parties must submit any factual information to Commerce within the time limits established by 19 C.F.R. § 353.31 (1992). This regulation provides in pertinent part

> (a) *Time limits in general* (1) [S]ubmissions of factual information for the Secretary's consideration shall be submitted not later than:
>
> * * * * * * *
>
> (ii) For the Secretary's final results of an administrative review under § 353.22 (e) or (f), the earlier of the date of publication of notice of preliminary results of review or 180 days after the date of publication of notice of initiation of the review * * *.
>
> (3) The Secretary will not consider in the * * * final results, or retain in the record of the proceeding, any factual information submitted after the applicable time limit. The Secretary will return such information to the submitter with written notice stating the reasons for return of the information.

19 C.F.R. § 353.31(a)(1)(ii), (a)(3). The record indicates Sugiyama attempted to provide Commerce with factual information after publication of the *Preliminary Results.* In order to aid Commerce in meeting the statutory time limits for completing section 751 reviews, parties must submit information in a timely manner. As this Court has previously stated, "it [is] imperative the requested information be submitted within a period that allows Commerce sufficient time for adequate analysis and comment while still meeting statutory deadlines." *Ansaldo Componenti, S.p.A. v. United States,* 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986). The Court, therefore, denies plaintiffs' motion with respect to this point and holds Commerce properly rejected plaintiffs' submission.

C. *Computer Printouts of Commerce's Calculations:*

In *Sugiyama I,* the Court discussed the issue of whether 19 C.F.R. § 353.28 (1988) requires Commerce to provide respondents with a complete set of computer printouts of Commerce's calculations. *Sugiyama I,* 18 CIT at ____, Slip Op. 94–78 at 25–26. Section 353.28 states Com-

merce "will disclose the calculations performed in connection with a final antidumping duty determination * * *." Commerce argued in *Sugiyama I* that this language does not require it to provide respondents with a complete set of computer printouts. Moreover, Commerce contended, "because it provided plaintiffs with a complete set of formulas, computer programs, analysis memoranda and sample calculations, and plaintiffs already possessed their own data, plaintiffs had everything they needed to replicate Commerce's calculations." *Sugiyama 1*, 18 CIT at ____, Slip Op. 94–78 at 25. The Court held Commerce's interpretation of 19 C.F.R. § 353.28 to be controlling because it was "neither plainly erroneous nor inconsistent with the regulation." *Id.* at ____, Slip Op. 94–78 at 26 (citing *Asociacion Colombiana de Exportadores de Flores v. United States*, 8 Fed. Cir. (T) 126,131, 903 F.2d 1555, 1559–60 (1990)).

In the instant action, as in *Sugiyama I*, Commerce supplied plaintiffs with the complete computer program, printed sample pages of the transactions used in deriving the preliminary results, and analysis memoranda. *See Final Results*, 57 Fed. Reg. at 56,321. Commerce's provision of information to Sugiyama in the instant action is consistent with its interpretation of 19 C.F.R. § 353.28 in *Sugiyama I*. Accordingly, plaintiffs' argument with respect to this issue fails and the Court holds Commerce properly refused to provide Sugiyama with complete computer printouts of all Commerce's calculations.

D. *Company E and Sugiyama's Relationship:*

The Court has also already addressed the parties' arguments with respect to Company E's status in *Sugiyama I*. *See Sugiyama I*, 18 CIT at ____ Slip Op. 94–78 at 18–21. Plaintiffs contended in *Sugiyama I* that Commerce had erroneously determined Sugiyama and Company E (referred to as X in *Sugiyama I)* are related parties pursuant to 19 U.S.C. § 1677(13)(C) (1988). *Id.* at ____, Slip Op. 94–78 at 19. Commerce claimed it properly concluded Sugiyama is related to Company E based on the presence of two common directors and the fact Sugiyama provided 60% of Company E's start-up capital. *Id.* at ____, Slip Op. 94–78 at 19. In response to these arguments, the Court held "Commerce may properly consider both financial and/or non-financial connections when assessing whether parties are related within the meaning of 19 U.S.C. § 1677(13)(C)." *Id* at ____ Slip Op. 94–78 at 20 (quotations and citation omitted). The Court further stated despite Sugiyama's insistence that the start-up capital was merely a loan, "[ ]" *Id.* at ____, Slip Op. 94–78 at 20. The Court concluded in *Sugiyama I*, as it does in the instant action, Commerce's determination that Sugiyama and Company E are related parties within the meaning of § 1677(13)(C) is based on substantial evidence on the record.

CONCLUSION

The Court holds Commerce properly (1) rejected Sugiyama's March 20, 1992 submission as untimely; (2) used Hokoku's sales in its calculation of FMV; (3) determined it was not required to provide Sugiyama

with complete computer printouts of all its calculations; and (4) determined Sugiyama and Company E are related parties within the meaning of 19 U.S.C. § 1677(13)(C) (1988).

On remand, Commerce is directed to (1) reexamine its selection of best information available for unmatched transactions; (2) eliminate the computer programming errors which resulted in differences in merchandise adjustments with respect to sales of identical models; and (3) address whether a comparison of sales to I&OC with sales by Companies E and H to their respective customers merits a level of trade adjustment.

(Slip Op. 94–123)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES, AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 92–03–00169

Plaintiffs move pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record. Plaintiffs specifically object to the following actions of the Department of Commerce, International Trade Administration ("Commerce"): (1) failure to use annualized weighted-average U.S. prices when it used annualized weighted-average foreign market values; (2) failure to limit permissible deviation with a 10% "cap" on each physical criterion in its model match methodology; (3) treatment of direct selling expenses as a reduction to U.S. price rather than an addition to foreign market value; (4) failure to prefer comparisons of U.S. and home market similar products sold at the same level of commercial trade to comparisons of U.S. and home market identical products sold at different levels of commercial trade; (5) treatment of home market post-sale price adjustments as indirect selling expenses while treating U.S. discounts as direct selling expenses; (6) treatment of home market warranty expenses as indirect selling expenses; and (7) failure to make circumstance of sale adjustments to constructed value.

Held: Plaintiffs' motion is granted in part and this case is remanded to Commerce for: (1) imposition of a 10% limit upon deviation of each physical criterion in the five-criterion model match methodology used in the final results for selecting the most similar home market tapered roller bearing model; and (2) addition of direct selling expenses to foreign market value rather than their deduction from United States price.

[Plaintiffs' motion is granted in part and denied in part; this case is remanded to Commerce.)

(Dated July 29, 1994)

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Susan P. Strommer, Niall P. Meagher and *Elizabeth C. Hafner)* for plaintiffs, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis,* Assistant Director); of counsel: *Linda S. Chang* and *Joan L. MacKenzie,* Attorney-Advisors,

Office of the Chief Counsel for import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., William A. Fennell, Christopher J. Callahan and *Patrick J. McDonough)* for defendant-intervenor, The Timken Company.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo"), challenge certain aspects of the Department of Commerce, international Trade Administration's ("Commerce") final results of the second administrative review of certain tapered roller bearings ("TRBs") from Japan. *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan; Final Results of Antidumping Duty Administrative Review ("Final Results"),* 57 Fed. Reg. 4,951 (Feb. 11, 1992).

BACKGROUND

In 1987, Commerce published an antidumping duty order on TRBs from Japan. *Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan,* 52 Fed. Reg. 37,352 (Oct. 6, 1987). In 1991, Commerce published its final results of its first administrative review of TRBs covered by the 1987 order, covering the period March 27, 1987 through September 30, 1988. *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan; Final Results of Antidumping Duty Administrative Review,* 56 Fed. Reg. 41,508 (Aug. 21, 1991). On February 11, 1992, Commerce published its final results in this proceeding, covering the period October 1, 1988 through September 30, 1989. *Final Results,* 57 Fed. Reg. 4,951.

Koyo moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record, alleging the following actions by Commerce were unsupported by substantial evidence on the agency record and not in accordance with law: (1) failure to use annualized weighted-average U.S. prices ("USPs") when it used annualized weighted-average foreign market values ("FMVs"); (2) failure to limit permissible deviation with a 10% "cap" on any single physical criterion in its model match methodology; (3) treatment of direct selling expenses as a reduction to U.S. price rather than an addition to foreign market value; (4) failure to prefer comparisons of U.S. and home market similar products sold at the same level of commercial trade to comparisons of U.S. and home market identical products sold at different levels of commercial trade; (5) treatment of home market post-sale price adjustments as indirect selling expenses while treating U.S. discounts as direct selling expenses; (6) treatment of home market warranty expenses as indirect selling expenses; and (7) failure to make circumstance of sale adjustments to constructed value. *Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Judgment on the Agency Record ("Koyo's Brief")* at 9–54.

DISCUSSION

The Court's jurisdiction over this matter is derived from 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

A final determination by Commerce in an administrative proceeding will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. *Averaged FMV:*

Koyo alleges Commerce inappropriately compared averages of FMV representing home market sales over a twelve-month period with actual U.S. prices, instead of with similarly averaged U.S. prices. *Koyo's Brief* at 9–21.

Koyo maintains such an inherently unfair comparison between individual prices and averaged prices distorts the dumping margins calculated and is contrary to the antidumping statute. *Id.* at 10–18. Citing the provision permitting Commerce to average U.S. prices and asserting that U.S. prices were as stable as FMVs, Koyo argues that Commerce abused its discretion by not averaging U.S.prices and thereby inflating Koyo's dumping margins in this comparison. *Id.* Koyo argues Commerce's creation of certain annual average prices based on only a few home market sales further distorts the dumping margins. *Id.* at 18–20.

Commerce maintains it acted within its discretion and in accordance with the statutory scheme, which does not require it to average USP whenever it decides to average FMV. *Defendants' Memorandum in Partial Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("Defendants' Brief")* at 9–21. Commerce asserts that to prevent the masking of dumping, it followed its long-standing practice of averaging USP only when perishable products are sold at distress prices as a result of necessity and not of unfair competition. *Id.* at 11–15. Commerce argues its averaging was reasonable as the home market prices over the entire review period were stable. *Id.* at 18–21.

Defendant-intervenor, The Timken Company ("Timken"), echoes the arguments made by Commerce. *The Timken Company's Response to Plaintiffs' Motion for Judgment on the Agency Record and Memorandum in Support Thereof ("Timken's Brief")* at 18–30.

The statute at issue here grants Commerce exclusive discretion to use averaging techniques as long as a significant volume of sales is involved and the averaging is representative:

[T]he administering authority may—

> (1) use averaging or generally recognized sampling techniques whenever a significant volume of sales is involved or a significant number of adjustment to prices is required, and
>
> (2) decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise.

(b) Selection of samples and averages

> The authority to select appropriate samples and averages shall rest exclusively with the administering authority; but such samples and averages shall be representative of the transactions under investigation.

19 U.S.C. § 1677f–1 (1988). There is no provision that requires Commerce to average USP once it has averaged FMV.

In the case at hand, Commerce conducted two studies to ensure the averaging of FMV would be representative. *Final Results,* 57 Fed. Reg. at 4,959. That there was a significant volume of sales involved is not at issue. Thus, Commerce's decision to average foreign market value was in accordance with law.

Acting within its discretion, Commerce declined Koyo's invitation to average USP: "[Averaging USP] would allow a foreign producer to mask dumping margins by offsetting dumped prices with prices above FMV * * *. Except in instances where the Department has conducted reviews of seasonal merchandise which has very significant price fluctuations due to perishability * * *, the idea of averaging U.S. prices has been rejected." *Id.*

This Court has already decided this issue and adheres to its decisions in *Koyo Seiko Co. and Koyo Corp. of U.S.A. v. United States,* 17 CIT ____, 834 F. Supp. 431 (1993) and *Koyo Seiko Co. and Koyo Corp. of U.S.A. v. United States,* 17 CIT ____, 840 F. Supp 136 (1993), *aff'd,* 20 F.3d 1156 (Fed. Cir. 1994), wherein this Court held the averaging of FMVs without any averaging of USP not to be an abuse of discretion. Therefore, the determination of Commerce as to this issue is affirmed.

2. *Model Match Methodology:*

Koyo argues that, for purposes of calculating dumping margins, Commerce compared dissimilar merchandise because it did not impose a ten percent limit upon deviation from the five-criterion model match methodology ("sum of the deviations" methodology) for selecting the most similar home market TRB model, as it did in the original investigation in this proceeding. *Koyo's Brief* at 21–32. Koyo alleges that, in failing to impose this ten percent "cap" on each physical criterion, Commerce abdicated its statutory responsibility to make price comparisons only between U.S. and home market products that provide a reasonable basis for reaching a fair dumping determination and that are comparable in commercial value, alike in component materials or at least in the purposes for which used. *Id.* at 32.

Commerce asserts that when identical merchandise is not available in the home market for comparison with the merchandise sold in the United States, it is for Commerce to choose "similar" merchandise based upon the physical characteristics of the merchandise being compared. *Defendants' Brief* at 21–38. Commerce argues that it has been granted broad discretion to devise amethodology for determining "similar" merchandise and that the Court should not substitute its own construction of the statute for Commerce's reasonable interpretation of

the statute. *Defendants' Brief* at 22–35. Timken reiterates the arguments made by defendants. *Timken's Brief* at 31–40.

19 U.S.C. § 1677(16) (1988) is the relevant provision.[1] It does not specify the methodology which is to be used and, indeed, Commerce has been granted broad discretion to devise a methodology for determining what constitutes "similar" merchandise. *See Smith-Corona Group, Consumer Prods. Div., SCM Corp. v. United States,* 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984).

In this review, Commerce compared home market sales of TRBs to U.S. sales according to five physical characteristics criteria, determining a "similar" bearing by computing a single factor, the "sum of the deviations," which is based on differences between the U.S. and home market bearings. *Final Results,* 57 Fed. Reg. at 4, 952.

An accurate investigation requires that the merchandise used in the comparison be as similar as possible. Furthermore, as plaintiffs correctly maintain, there is a statutory preference for comparison of most similar, if not identical merchandise for the purpose of FMV calculations. 19 U.S.C. § 1677(16); *see Timken Co. v. United States,* 10 CIT 86, 96, 630 F. Supp. 1327, 1336 (1986). Undoubtedly, the ITA's fundamental objective in an antidumping investigation is to compare the United States price of imported merchandise with the value of "such or similar merchandise" sold in the foreign market. *Timken,* 10 CIT at 95, 630 F. Supp. at 1336.

This Court recently ruled on this issue in *Koyo Seiko Co.,* 17 CIT at ____, 834 F. Supp. at 434–35, stating that Commerce's methodology "must be used in conjunction with the ten percent cap to limit the permissible deviation of the criteria used to make TRB models." *Id.* at ____, 834 F. Supp. at 435. The use of a ten percent cap avoids comparisons between products which differ so dramatically that they simply cannot be considered commercially similar. *Id.* More recently, this Court adhered to this decision in *NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp. and NTN Corp. v. United States,* 17 CIT ____, ____, 835 F. Supp. 646, 648 (1993); *appeal after remand, dismissed,* 18 CIT ____, 843 F. Supp. 737 (1994).

The Court adheres to its earlier decisions and, therefore, this case is remanded to Commerce to impose a 10% limit upon deviation from the

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[1] 19 U.S.C. § 1677(16) (1988) provides:

> The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:
>
> (A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

five-criterion model match methodology used in the final results for selecting the most similar home market TRB model.

3. *U.S. Direct Selling Expenses:*

Koyo asserts Commerce erred in treating Koyo's U.S. direct selling expenses as a reduction to U.S. price rather than an addition to foreign market value. Koyo states direct selling expenses should be added to FMV as a matter of law and Commerce acted contrary to explicit direction from this Court in deducting them from USP. Deducting direct selling expenses from USP, Koyo asserts, inflates the weighted-average margin and leads to a distortion of dumping margins. *Koyo's Brief* at 33–34.

While conceding that this Court has ruled adversely to its position on this point, Commerce contends it has acted consistently with 19 U.S.C. § 1677a(e)(2) (1988), rather than adding direct selling expenses to FMV pursuant to the circumstance of sale adjustment contained in 19 U.S.C. § 1677b(a)(4)(B) (1988). Commerce asserts that the deduction of direct selling expenses from USP will result in a more accurate assessment of dumping duties and that 19 U.S.C. § 1677a(e)(2) does not limit the deduction of expenses to the deduction of indirect selling expenses. Commerce states there has been no opportunity to appeal any of this Court's rulings on this matter and, consequently, maintains its position. *Defendants' Brief* at 38–45.

Timken agrees with Commerce's methodology arguing it yields the same dumping duties and reconciles the two statutory provisions at issue. *Timken's Brief* at 41–47.

According to 19 U.S.C. § 1677a(e), "the exporter's sale price shall be adjusted by being reduced by the amount, if any, of * * * expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise."

The Court of Appeals for the Federal Circuit has interpreted that provision as referring only to indirect selling expenses and not direct selling expenses. *Consumer Prods. Div., SCM Corp. v. Silver Reed America,* 753 F.2d 1033, 1036–38 (Fed. Cir. 1985).

This issue has once again unnecessarily consumed the Court's time as the Court has consistently held that "direct selling expenses are properly characterized as differences in circumstances of sale giving rise to an adjustment of FMV." *E.g., NSK Ltd. v. United States,* 17 CIT ____, ____, 819 F. Supp. 1096, 1099 (1993), *mot. denied, dismissed,* 17 CIT ____, 825 F. Supp. 315 (1993); *see also NTN Bearing Corp. of America v. United States,* 14 CIT 623, 637, 747 F. Supp. 726, 738–39 (1990); *see also Timken Co. v. United States,* 11 CIT 786, 800, 673 F. Supp. 495, 509 (1987).

Although the law is clear on this issue, Commerce repeatedly ignores the law and disobeys the decisions of this Court. *See e.g., NSK Ltd.,* 17 CIT at ____, 819 F. Supp. at 1099. This Court has repeatedly cautioned Commerce that it is to adhere to the law and to the decisions of

this Court or this Court will be compelled to order sanctions against the government. *See e.g., id.*

Absent any contrary authority, this Court adheres to the abundance of case law on this issue and, therefore, this case is remanded to Commerce to add direct selling expenses to FMV rather than deducting them from USP.

4. *Comparison of Sales Across Different Levels of Trade:*

Koyo alleges that in choosing such or similar sales for comparison, Commerce disregarded 19 C.F.R. § 353.58 (1992) by comparing sales across different levels of trade when sales at the same level of trade were available. *Koyo's Brief* at 35–41. Koyo states that it makes sales in the U.S. and Japan at two significantly different levels of trade—to original equipment manufacturers and to the aftermarket for replacement parts. *Id.* at 35–36. Koyo asserts that Commerce improperly and unfairly considered sales of identical merchandise at different levels of trade *before* considering sales of the most similar merchandise at the same level of trade. *Id.* at 36–37. Koyo maintains that this methodology is contrary to the statute and regulation, which require Commerce to search for comparisons of sales at the same level of trade before crossing over to compare sales at a different level of trade. *Id.* at 37–39.

Defendants defend Commerce's methodology as consistent with law and with prior decisions of this Court which state level of trade is not a requirement for selecting such or similar merchandise. *Defendants' Brief* at 45–49. Commerce asserts that it first searched for identical merchandise at the same level of trade and then at different levels of trade, making adjustments for differences that affect price comparability across different levels of trade. *Id.* at 45–46. Timken agrees with defendants' arguments. *Timken's Brief* at 48–53.

19 C.F.R. § 353.58 states that Commerce "normally will calculate foreign market value and United States price based on sales at the same commercial level of trade." If such sales are insufficient for an adequate comparison, Commerce must calculate FMV "based on sales of such or similar merchandise at the most comparable commercial level of trade as sales of the merchandise and make appropriate adjustments for differences affecting price comparability." *Id.*

Based upon data submitted by Koyo regarding the existence of two levels of trade, Commerce initially attempted to make its comparison of sales at the same level of trade and, when no identical home market sales were discovered, Commerce then searched the next level of trade for identical merchandise. Commerce then searched the same level of trade for most similar merchandise and, finally, the next level of trade for most similar merchandise. *Defendants' Brief* at 45–46. Therefore, Koyo's argument that Commerce failed to fulfill its obligation to search the same level of trade is erroneous.

This Court has on several occasions affirmed Commerce's selection of home market merchandise at levels of trade different from the U.S. merchandise to which it is compared. *Koyo Seiko Co. v. United States,* 16 CIT

539, 545, 796 F. Supp. 1526, 1532 (1992), *vacated, remanded,* 16 CIT 788, 806 F. Supp. 1008 (1992); *NTN Bearing Corp. of America v. United States,* 14 CIT 623, 634, 747 F. Supp. 726, 736 (1990); *Timken Co.,* 11 CIT at 793, 673 F. Supp. at 504.

In addition, this Court has previously specifically rejected the argument put forth by Koyo: "there is no statutory mandate requiring Commerce to remain within the same level of trade while effecting its 'such or similar merchandise' determination. [Citation omitted.] plaintiffs, therefore, have no basis for requesting that the Court require Commerce to limit its comparisons by the level of trade in which the sales occur." *NTN Bearing Corp.,* 14 CIT at 634, 747 F. Supp. at 736.

Therefore, Commerce's comparison of sales across different levels of trade was reasonable and in accordance with law.

Koyo also contends that Commerce's methodology is contrary to Article 2(6) of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ("GATT") (1979). *Koyo's Brief* at 39–40.

Article 2(6) of the GATT, titled "Determination of Dumping," states that, in the context of price comparisons in antidumping proceedings, prices "shall be compared at the same level of trade" and "[d]ue allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability."

This Court has already addressed this very issue in *Koyo Seiko Co. and Koyo Seiko Corp. of U.S.A. v. United States,* 17 CIT ____, ____, 810 F. Supp. 1287, 1290–91, wherein the Court held first, that compliance with this GATT provision does not require comparison of sales at the same level of trade since the provision itself clearly makes exception and allows for the adjustment of prices when sales are made under different terms and conditions and, second, that even if Commerce's methodology was contrary to this provision, domestic law, not the GATT, is controlling. The Court has been presented with no new argument and adheres to its previous decision regarding this issue.

Therefore, Commerce's comparison of merchandise across different levels of trade is affirmed.

5. *Home Market Post-Sale Price Adjustments and U.S. Discounts:*

In its brief, Koyo argues Commerce erred in treating Koyo's home market post-sale price adjustments as indirect selling expenses. *Koyo's Brief* at 41–48. In its *Reply of Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. to Oppositions to Plaintiffs' Motion for Judgment on the Agency Record ("Reply Brief"),* Koyo withdraws its claim for treatment of home market post-sale price adjustments, as discussed with counsel for defendants and Timken. *Reply Brief* at 2. Accordingly, this Court will not further address this issue.

Koyo also argues that Commerce erred in treating U.S. discounts as direct selling expenses. *Koyo's Brief* at 45–48. Koyo maintains it was an abuse of discretion for Commerce to treat U.S. discounts differently

from home market post-sale price adjustments since U.S. discounts were granted and reported on virtually the same basis as were home market post-sale price adjustments. *Id.* Koyo asserts fairness requires that these costs be treated in the same manner in both markets. *Id.* at 46. According to Koyo, different treatment will result in a distorted comparison and the creation or widening of dumping margins on some sales. *Id.* at 47.

Timken responds that Commerce properly made an adverse assumption and treated U.S. discounts as direct expenses, given that Koyo failed to provide sufficient information demonstrating its adjustment was indirect and that it is to Koyo's advantage to have U.S. discounts treated as indirect expenses. *Timken's Brief* at 60–61.

This Court finds that Koyo's arguments are without merit. It is established that U.S. selling expenses are presumed to be direct and the burden of proving otherwise is on the respondent. *Timken Co. v. United States,* 11 CIT 786, 804, 673 F. Supp. 495, 512–13 (1987); *see also Torrington Co. v. United States,* 17 CIT ____, ____, 832 F. Supp. 365, 376, 378 (1993); *see also Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan; Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 4,951, 4,955 (Feb. 11, 1992); *see also Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Review,* 56 Fed. Reg. 65,228, 65,229 (Dec. 16, 1991).

A contrary practice would destroy any incentive a respondent has to provide Commerce with actual U.S. selling expense information. *Torrington Co.,* 17 CIT at ____, 832 F. Supp. at 376. An indirect U.S. selling expense can be "offset" by home market indirect selling expenses. 19 C.F.R. § 353.56(b)(2) (1992). Such an offset, which is not permitted with U.S. selling expenses classified as direct, increases allowable deductions from foreign market value and reduces dumping margins. It would therefore be to the respondent's advantage to fail to provide Commerce with information directly relating U.S. selling expenses to sales of covered merchandise. *Timken Co.,* 11 CIT at 804, 673 F. Supp. at 513.

As Koyo has failed to overcome the presumption that the U.S. discounts and rebates are direct selling expenses, this issue is hereby affirmed.

6. *Home Market Warranty Expenses:*

In its brief, Koyo argues Commerce erred in treating Koyo's home market warranty expenses as indirect selling expenses. *Koyo's Brief* at 48–50. In its *Reply Brief,* Koyo withdraws its claim for treatment of home market warranty expenses as direct selling expenses. *Reply Brief* at 2. Accordingly, this Court will not further address this issue.

7. *Circumstance of Sale Adjustments to Constructed Value:*

Koyo states Commerce erred in failing to make circumstance of sale adjustments to constructed value. *Koyo's Brief* at 50–54. Koyo alleges that, when FMV was based on constructed value, Commerce declined to

deduct Koyo's direct selling expenses, claiming Koyo did not properly describe the expenses and treating them instead as indirect selling expenses. *Id.* at 50. Koyo states it was improper of Commerce to do so, since Commerce neither requested that Koyo provide this information nor informed Koyo that the information it provided was deficient. *Id.* Koyo argues that, pursuant to the antidumping statute, Commerce is required to make circumstance of sale adjustments to constructed value as constructed value is one form of FMV. *Id.* at 51. Koyo further objects on the grounds that Commerce's treatment of the selling expenses at issue as indirect is equivalent to the punitive use of best information available. *Id.* at 52–54.

Defendants contend Commerce properly rejected Koyo's request for treatment of the expenses as circumstance of sale adjustments because Koyo did not quantify the amount of direct selling expenses attributable to commissions and credit. *Defendants' Brief* at 54–55. Defendants state, pursuant to Commerce's regulations, any party claiming a circumstance of sale adjustment must establish its claim to Commerce's satisfaction. *Id.* Since Koyo did not, defendants assert Commerce properly characterized the expenses as indirect and Koyo's argument equating this treatment with use of best information available is without merit. *Id.* Timken agrees with defendants' arguments. *Timken's Brief* at 65–68.

Plaintiff is quite correct that Commerce is required to make circumstance of sale adjustments to all forms of foreign market value, including constructed value, in order to achieve a fair comparison. *Timken Co. v. United States*, 11 CIT 786, 797, 673 F. Supp. 495, 507 (1987); 19 U.S.C. § 1677b(a)(4)(B) (1988).[2] However, whether an expense is deemed a circumstance of sale adjustment is at the discretion of Commerce. 19 U.S.C. § 1677b(a)(4) ("if it is established to the satisfaction of the administering authority"); *see also* 19 C.F.R. § 353.54 (1992). Courts have concluded Commerce enjoys broad discretion to employ circumstance of sale adjustments. *See, e.g., Smith-Corona Group, Consumer Prod. Div., SCM Corp. v. United States*, 713 F.2d 1568, 1575 (Fed. Cir. 1983).

Therefore, Commerce acted within its discretion when it decided not to make a circumstance of sale adjustment to constructed value, characterizing the expenses at issue as indirect selling expenses, and this issue is hereby affirmed.

Conclusion

In accordance with the foregoing opinion, this case is remanded to Commerce for imposition of a 10% limit upon deviation from the five-criterion model match methodology used in the final results for selecting the most similar home market TRB model and for addition of direct

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[2] In relevant part, 19 U.S.C. § 1677b(a) (4) states:

> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value * * * is wholly or partly due to—
>
> * * * * * * *
>
> (B) other differences in circumstances of sale * * * then due allowance shall be made therefor.

selling expenses to foreign market value rather than their deduction from United States price. Commerce's determination is affirmed in all other respects. Remand results are due within ninety (90) days of the date this opinion is entered. Any comments or responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

(Slip Op. 94–124)

AT&T INTERNATIONAL, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–06–00276

[On Customs refusal to reliquidate an entry of American goods returned, summary judgment for the defendant.)

(Decided July 29, 1994)

Grunfeld, Desiderio, Lebowitz & Silverman (Robert B. Silverman and *Judith A. Schechter)* for the plaintiff.

Frank W. Hunger, Assistant Attorney General; *John J. Mahon,* Assistant Branch Director, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice, Civil Division *(Bruce N. Stratvert);* Office of Assistant Chief Counsel, U.S. Customs Service *(Arlene Klotzko),* of counsel, for the defendant.

OPINION

AQUILINO, *Judge:* This action is another test of the balance of responsibilities between importers and the U.S. Customs Service when their merchandise traverses the border of this country. Joining the flood of foreign imports in this instance were some 57 cartons of telephone parts and equipment claimed to have been made in America but also to be "defective" and thus returned from Egypt.

I

Issue having been joined, the plaintiff has interposed a motion for summary judgment pursuant to CIT Rule 56. Defendant's papers in opposition have been erroneously labelled a motion to dismiss the complaint pursuant to Rule 12(b)(5) on the ground that the plaintiff has failed to state a claim upon which relief can be granted.[1] In any event, there is little dispute over the material facts. Of the 16 numbered averments in the complaint, defendant's answer admits eleven, claims lack of sufficient information as to three, and only denies the following two allegations of a cause of action:

> 14. Plaintiff's failure to provide Customs with a manufacturer's affidavit and CF–3311 was the result of a clerical error or inadver-

[1] Under the rules of practice, such a motion can only be made before answering a complaint. Once an answer has been interposed, which is the case here, a motion seeking dismissal is properly one for judgment on the pleadings or summary judgment pursuant to CIT Rule 12(c) or Rule 56.

tence which is correctable by a Section 520(c)(1) request to reliquidate. Accordingly, its claim is cognizable under that section.

* * * * * * *

16. The subject merchandise in Entry No. 85–238940–3 is entitled to duty-free [treatment) under item 800.00, TSUS as American goods returned.

Moreover, Defendant's Response to Plaintiff's Statement of Material Facts as to Which There is No Genuine Issue to be Tried admits eleven of plaintiff's 15 representations, including:

2. Plaintiff timely protested the denial of its request to reliquidate Entry No. 85–238940–3, and all duties owed or assessed against the subject merchandise have been paid.

* * * * * * *

4. The merchandise involved in this action consists of telephonic equipment which was entered into the United States in Entry No. 85–238940–3 on January 8, 1985.

5. Plaintiff's customs broker prepared the entry which stated that the merchandise in issue was classifiable under item 800.0035, TSUS, as American goods returned, free of duty.

6. On August 5, 1985, Customs issued a CF 29 (Notice of Action) which proposed a rate advance unless * * * documents were submitted to Customs. The CF 29 was not addressed to any particular person at AT&T; it was merely addressed to AT&T International at P.O. Box 7000, Basking Ridge, N.J. 07920.

* * * * * * *

11. On November 15, 1985, Customs liquidated the subject entry and assessed duties based on classification of the subject merchandise in Item 684.59, TSUS, under which the merchandise was dutiable at the rate of 8.5% *ad valorem*.

12. On November 14, 1986, plaintiff timely filed a Section 520(c)(1) Request to Reliquidate the subject entry to correct a clerical error, mistake of fact, or inadvertence. Copies of the Manufacturer's Affidavit and CF 3311 were provided in support of plaintiff's request to reliquidate.

13. Customs denied the request to reliquidate the subject entry.

14. AT&T international timely protested the denial of its request to reliquidate the subject merchandise.

15. On December 22, 1989, customs denied plaintiff's protest. The basis of this denial was Customs' determination that "the subject of your claim is not within the scope of Section 520(c)(1)."

In sum, the court concludes that there are no material facts requiring trial as between the plaintiff and defendant; the dispositive issues to be resolved are legal in nature, and summary judgment is therefore appropriate.

Jurisdiction is based on 28 U.S.C. § 1581(a).

II

As the foregoing indicates, the plaintiff attempts to rely on 19 U.S.C. § 1520(c)(1), which provided at the time of entry:

> **Reliquidation of entry**
>
> Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—
>
> (1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction[.]

Regulations of the Secretary, in particular, 19 C.F.R. § 173.4 (1985), incorporate the substance of this statute. It has been held, however, that these provisions are "not remedial for *every* conceivable form of mistake or inadvertence adverse to an importer, but rather * * * offer [ ] 'limited relief in the situations defined therein'". *Godchaux-Henderson Sugar Co. v. United States,* 85 Cust.Ct. 68, 74, C.D. 4874, 496 F.Supp. 1326, 1331 (1980) (emphasis in original), quoting *Phillips Petroleum Co. v. United States,* 54 CCPA 7, 11, C.A.D. 893 (1966).

Nonetheless, the plaintiff views its situation as within the purview of these provisions. Attached to its formal request to Customs for reliquidation pursuant to section 1520(c) were a Form 3311 and Manufacturer's Declaration executed on behalf of AT&T to the effect that the goods covered by the entry at issue had indeed been manufactured in the United States. Given that this request for reliquidation was forthcoming within one year after liquidation (albeit on the very last day thereof), the plaintiff argues that its action reflects

> exactly the type of non-legal administrative mixup that Section 520 was intended to remedy. Our case presents the following constellation of acts and omissions which are correctable under Section 520:
>
> (1) Port Brokers, Inc.'s *inadvertent* failure to file the required documents with Customs before liquidation in accordance with AT&T's instructions;
>
> (2) AT&T's *mistake of fact* in assuming that Port Brokers had filed these documents in a timely manner in accordance with its instructions; and
>
> (3) Customs' *clerical errors* in sending the entry's "courtesy" liquidation notice and duty bill to the wrong corporate entity at the wrong address.
>
> Each of these errors is individually cognizable as a correctable claim under Section 520. Taken together, they present precisely the sort of situation that this statute was enacted to remedy.[2]

[2] Plaintiff's Memorandum in Response to Defendant's Motion to Dismiss, p. 3 (emphasis in original).

The court cannot concur that this "constellation of acts and omissions" was the underlying cause of the challenged classification. *Cf. Boast, Inc. v. United States,* 17 CIT ____, ____, Slip Op. 93–20, at 6 (Feb. 10, 1993), citing *Concentric Pumps, Ltd. v. United States,* 10 CIT 505, 509, 643 F.Supp. 623, 625 (1986). That is, the classification was not the result of any "administrative mixup" by Customs. The merchandise had entered duty-free under continuous entry bond without a Form 3311 and manufacturer's declaration. When simple form notices were sent thereafter to AT&T and its broker, requesting that simple, confirmatory documentation, presumably they were inspired by a desire on the part of the Service to avoid any such "mixup" before liquidation. After months had passed without any response to those notices, Customs issued a Notice of Action on Form 29 to AT&T International, setting forth a *"proposed"*[3] rate advance in the absence of the requested information. Then when months passed without any response to that proposal, the Service liquidated the entry as fairly forewarned.

A

To this day, AT&T's chosen agent, Port Brokers, Inc., has neither provided Customs with the information requested nor stepped forward during discovery or the preparation of plaintiff's motionin this action with an explanation. The only explanation attempted at bar is by the plaintiff, primarily via paragraphs 7–10 of its statement of material facts pursuant to CIT Rule 56(i), as supplemented by an affidavit of one John J. Leber, affirming that his job responsibilities with AT&T included preparing documents of the kind requested by the Service and that Port Brokers served as the customs broker in this matter. He further states:

> 7. Mr. Lofaro of Port Brokers, Inc. called my co-worker Bertha Shaw some time before September 26, 1985 regarding the entry in question. * * * Ms. Shaw's responsibilities covered exports to the Middle East and Europe. Mr. Lofaro apparently told Ms. Shaw that Customs was requesting that AT&T supply a CF 3311 and manufacturer's affidavit with respect to Entry No. 85–238940–3, and that AT&T would be billed $72,000 in duties if AT&T did not comply with this request. Mr. Lofaro apparently asked Ms. Shaw to present him with the required documents.
>
> 8. * * * Ms. Shaw sent me a note regarding their conversation * * * [and] turned the matter over to me because I was in charge of imports.
>
> 9. On September 26, 1985, I called Mr. Lofaro regarding the entry. I do not recall reaching him on this date. I called him again on September 30, 1985, at which time I asked him to send me the information and documentation necessary to complete the requested documents. * * * I told him that * * * I would complete the necessary forms and return them to him so that he could file them with Customs. He said * * * that when we sent him the manufacturer[']s

[3] Exhibit B to Memorandum in Support of Defendant's Motion to Dismiss (emphasis in original).

affidavit and the CF 3311 * * * he would file these forms with Customs.

10. A few days later I received * * * the materials I had requested from Mr. Lofaro. I then prepared the manufacturer's affidavit and CF 3311 for the review of my supervisors.

11. On October 7, 1985, I received for the first time a copy of a CF 29 (Notice of Action) from U.S. Customs * * * dated August 5, 1985 * * * [which] gave notice of a proposed rate advance for the returned telephone equipment. The notice cited a failure to submit a CF 3311 and a manufacturer's affidavit.

12. On October 10, 1985, I gave the manufacturer's affidavit and CF 3311 to Mr. Ron Mansfield, who was my project manager at the time * * * [and who] signed off on these documents on October 15, 1985. Mr. Ron Hebrank, my department chief, signed off on these documents after Mr. Mansfield had reviewed them.

13. On October 25, 1985, pursuant to my September 30, 1985 conversation with Mr. Lofaro, I sent the CF 3311 and manufacturer's affidavit to Port Brokers, Inc. via Federal Express's overnight delivery service.

14. It was my understanding that Port Brokers, Inc. would merely collate and file these documents with Customs as required.

If this is all the plaintiff is able to muster to explain the failure of its broker to file, the court cannot conclude that that failure was "inadvertent", as claimed. Nor can the court conclude that it was a mere "mistake of fact", as also claimed *supra*, for AT&T to assume that Port Brokers had filed the requested documentation in a timely fashion. While inadvertence or mistake of fact according to section 1520(c)[4] may relieve an importer from the consequences of liquidation[5], just as Customs may be relieved, the plaintiff has not borne its burden of persuasion on either statutory ground. That is, neither is manifest from the record or established by documentary evidence.

As for the third standard in the statute, the plaintiff attributes receipt of a courtesy notice of liquidation at an AT&T address in Virginia as opposed to the New Jersey address of the company given on the entry to "clerical error"[6] on the part of the Service. That could be, but 19 C.F.R. § 159.9(d) (1985), which provided for "courtesy" notice, also stated that it "shall serve as an informal, courtesy notice and not as a direct, formal,

---

[4] Inadvertence has been defined as "an oversight or involuntary accident, or the result of inattention or carelessness". *Hambro Automotive Corp. v. United States*, 603 F.2d 850, 854 (CCPA 1979); *B.S. Livingston & Co. v. United States*, 13 CIT 889, 892 (1989). In *Fabrene, Inc. v. United States*, 17 CIT ___, ___, Slip Op. 93–164, at 6 (Aug. 16, 1993), the court pointed out that

> "mistake of fact" has been defined as "a mistake which takes place when some fact which indeed exists is unknown, or a fact which is thought to exist, in reality does not exist." *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 68 Cust. Ct. 17, 22, C.D. 4327, 336 F. Supp. 1395, 1399 (1972) (finding mistake of fact where neither importer nor Customs officer were aware merchandise was entitled to duty-free entry), *aff'd*, 61 CCPA 90, C.A.D. 1129, 499 F.2d 1277 (1974).

[5] *See, e.g., C.J. Tower & Sons of Buffalo, Inc. v. United States*, cited and described in note 4, *supra*. *But compare* 83 Cong. Rec. 4,562 (1938), characterizing the Customs Administrative Act of 1938, including precursor section (18) to 1520, as primarily intended to "facilitate efficient administration of the customs laws. It cannot be termed an importers' bill nor can it be characterized as a domestic manufacturer's bill."

[6] This has been defined as a "mistake made by a clerk or other subordinate, upon whom devolves no duty to exercise judgment, in writing or copying the figures or in exercising his intention." *PPG Industries, Inc. v. United States*, 7 CIT 118, 124 (1984), citing *S. Yamada v. United States*, 26 CCPA 89 (1938); *Geo. Wm. Rueff, Inc. v. United States*, 41 Cust.Ct. 399, Abs. No. 62433 (1958); *Import Export Services of N.J. v. United States*, 38 Cust. Ct. 235, c.D. 1869 (1957).

and decisive notice of liquidation." Indeed, subsection (c) of 159.9 provided that the timely posting of the bulletin notice of liquidation in a conspicuous place in the customhouse at the port of entry "shall be deemed the legal evidence of liquidation." *See* 19 C.F.R. § 159.9 (1985) *passim; SRR v. Robles,* 18 CIT ____, ____, Slip Op. 94–85, at 4 (May 25, 1994).

B

The nature of this action then is analogous to that of *Cavazos v. United States,* 9 CIT 628 (1985), and *Occidental Oil & Gas Co. v. United States,* 13 CIT 244 (1989), wherein the plaintiff importers had sought Service reliquidation of merchandise alleged to be American goods returned but which status had not been timely supported by documentation of the kind also called for herein. In *Occidental,* for example, Customs had denied reliquidation on the stated ground that "the failure to file required documents whose absence had been repeatedly called to client's attention constitutes negligent inaction, not correctable under the cited statute." 13 CIT at 245. In affirming that determination, the court reiterated that, "since the plaintiff did not supply the proper documentation, 'the appropriate customs officer made a legal determination as to the classification of the merchandise on the basis of the facts presented'". 13 CIT at 248, quoting *Cavazos,* 9 CIT at 631, wherein the court further pointed out:

> * * * [P]laintiff has sought to utilize section 520(c) to challenge the classification. [T]his is an obvious attempt to use a section 520(c) procedure as a substitute for a challenge to the classification of the merchandise pursuant to section 514(a)(2). On the facts presented, it is clear that plaintiff's allegation of a mistake of fact is, in reality, a challenge to the legal conclusion of the Customs Service.

See also 13 CIT at 248–49.

That section 1520(c) does not supplant section 1514–(a)(2) has recently been reaffirmed by the Court of Appeals for the Federal Circuit in *ITT Corporation v. United States,* 24 F.3d 1384, 1387 n. 4 (Fed.Cir. 1994):

> Section 1520(c)(1) does not afford a second bite at the apple to importers who fail to challenge Customs' decision within the 90-day period set forth in § 1514.
>
> * * * We emphasize that under no circumstances may the provisions of § 1520(c)(1) be employed to excuse the failure to satisfy the requirements of § 1514.

This is obvious from the plain language Congress adopted, which provides that the appropriate customs officer "may"[7] reliquidate to correct a clerical error, etc. Had the intent been otherwise, presumably Congress would have enacted language making reliquidation mandatory.

[7] *See also* 19 C.F.R. § 10.1(d) (1985) (the district director "may waive" production of Customs Form 3311 and a manufacturer's declaration); 19 C.F.R. § 10.112 (1985) ("such document, form, or statement may be filed at any time prior to liquidation of the entry or, if the entry was liquidated, before the liquidation becomes final").

Be that as it may, there is no such actionable clerical error, mistake of fact, or inadvertence presented here. Hence, it is appropriate to repeat from the opinion in *Godchaux-Henderson, supra,* that section 1520(c)(1) affords but "limited relief in the situations defined therein." *Phillips Petroleum Co. v. United States,* 54 CCPA 7, 11, C.A.D. 893 (1966).

III

In view of the foregoing, plaintiff's motion for summary judgment must be denied, and this action must be dismissed. Judgment will enter accordingly.

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V94/16 7/28/94 Musgrave, J.	Orbisphere Laboratories	87–11–01068	Transaction value (19 U.S.C. 1401a(b))	Deductive value 19 U.S.C. § 1401a(d)	Orbisphere Corp. *v.* United States, Slip Op. 89–149 (Oct. 24, 1989) 726 F. Supp. 1344	JFK Oxygen analyzing apparatus
V94/17 7/28/94 Musgrave, J.	Orbisphere Laboratories	89–05–00271, etc.	Transaction value (19 U.S.C. 1401a(b))	Deductive value 19 U.S.C. § 1401a(d)	Orbisphere Corp. *v.* United States, Slip Op. 89–149 (Oct. 24, 1989) 726 F. Supp. 1344	JFK Oxygen analyzing apparatus

Index

Customs Bulletin and Decisions
Vol. 28, No. 33, August 17, 1994

U.S. Customs Service

Treasury Decisions

General Notices

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

U.S. G.P.O. 1994–301–610–60110